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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 253.

WILLIAM H. FOLSOM, APPELLANT,

vs.

ANN L. DEWEY ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 11, 1878.

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a Be it remembered, that on the 19th day of November, A. D. 1877, was filed in the office of the clerk of the supreme court of the Territory of Utah the transcript of an abstract of the record and proceedings, in and of the district court of the third judicial district of said Territory, "in the matter of the contest for a deed for lot 2, block 69, plat A, Salt Lake City survey," theretofore in said district court pending, of which said transcript and endorsements thereon the following is a copy, to wit:

b Supreme court, Territory of Utah.

In the matter of the contest for a deed for lot 2, block 69, plat A, Salt Lake City survey.

ANN L. DEWEY, CAROLINE E. MCCOMB, AND Wm. G. Lamareaux, claimants of the whole lot, appellants,
vs.
GEORGE G. SNYDER AS EXECUTOR, CLAIMANT of the east half of the lot, respondent.

WILLIAM H. FOLSOM, CLAIMANT OF SEVEN BY ten rods of said lot, appellant,
vs.
ANN L. DEWEY, CAROLINE E. MCCOMB, AND Wm. G. Lamareaux, claimants of the whole of said lot, respondents.

ABSTRACT.

Snow & Hoge, attorneys for W. H. Folsom, and George G. Snyder.
Bennett & Harkness, attorneys for Lamareaux' heirs.
Filed Nov. 19th, 1877.

E. T. SPRAGUE, *Clerk.*

1 Supreme court, Territory of Utah.

In the matter of the contest for a mayor's deed for lot 2, block 69, plat A, Salt Lake City survey.

ANN L. DEWEY, CAROLINE E. MCCOMB, AND Wm. G. Lamareaux, claimants of the whole lot, appellants,
vs.
GEORGE G. SNYDER AS EXECUTOR, CLAIMANT of the east half of the lot, respondent.

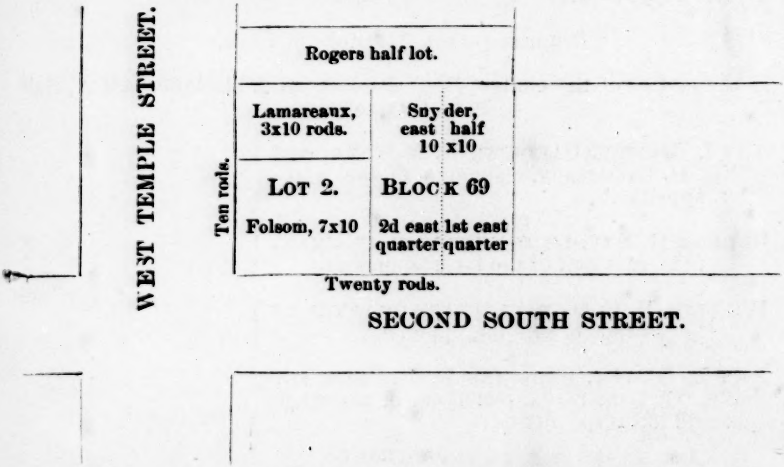
WILLIAM H. FOLSOM, CLAIMANT OF SEVEN BY ten rods of said lot, appellant,
vs.
ANN L. DEWEY, CAROLINE E. MCCOMB, AND Wm. G. Lamareaux, claimants of the whole of said lot, respondents.

ABSTRACT.

This contest arose in the probate court for Salt Lake County, Utah,

under the "townsite" acts of Congress and the Territory of Utah.

2 Lot 2, block 69, plot A, Salt Lake City survey, is twenty rods long east and west, and ten rods wide north and south, with a south front of twenty rods on Second South street, and a west front of ten rods on West Temple street, and is bounded east and north by other lots of the same block. This diagram approximately shows the situation of the lot, and its several parts in contest:



In the probate court, Isabel Lamareaux, widow, and Ann L. Dewey, Caroline E. McComb, and Wm. G. Lamareaux, children and heirs-at-law of Andrew L. Lamareaux, deceased, filed their statement and claim for the whole lot. Pending proceedings in that court, Isabel Lamareaux, the widow, died, and by an order of the court, further proceedings are prosecuted in the names of said children and heirs, who, for brevity, are herein called Lamareaux heirs.

William H. Folsom filed in said court his statement and claim for seven rods west front, by ten rods south front, in the southwest corner of the lot.

George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, filed in said court his statement and claim for the east half of said lot.

By the judgment of the probate court, duly rendered on the 11th day of June, 1874, the Lamareaux heirs were adjudged entitled to a deed for three rods west front, by ten rods long, off the north part of the west half of the lot.

3 Wm. H. Folsom was adjudged entitled to a deed for seven rods west front, by ten rods south front, in the southwest corner of the lot.

George G. Snyder, as executor of the will of S. C. Snyder, deceased, was adjudged entitled to a deed for the east half of the lot.

From so much of the judgment as determined the right to deeds for the east half, and seven by ten rods in the southwest corner of the lot, the Lamareaux heirs, on the 29th day of August, 1874, appealed to the district court for the third judicial district of said Territory, and procured the record filed in that court.

Thereupon, on the 10th day of January, 1875, the said Wm. H. Folsom, and George G. Snyder, as such executor, by their counsel, in due form, moved said court to dismiss the said appeal on the ground that, at the *the* time it was attempted, the law did not authorize an appeal; which motion the court overruled, and the said Wm. H. Folsom, and George G. Snyder, executor, by the counsel, in due form excepted to the overruling said motion.

After trial and argument in the said district court, the court made and filed, on the 5th day of September, 1877, the following finding (omitting here the title), to wit:

This case came on to be heard on the agreed statement of facts filed in the probate court on the 25th day of March, 1874, as well as upon the agreement of counsel filed in this case, in this court, on the 29th day of December, 1874, and the testimony produced in court. After it was argued by the respective parties, the court, upon con'deration, find that the land in controversy is a part of Salt Lake City survey. That it was declared upon by Daniel H. Wells, mayor of Salt Lake City, on the 21st day of November, 1871, pursuant to the act of Congress, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2d, 1867, and of the governor and legislative assembly of the Territory of Utah, entitled "An act prescribing rules and regulations for the execution of the trust arising under the aforesaid act of Congress," approved February 17th, 1869, and that a patent has been issued therefor to said mayor.

The court further finds that the notice contemplated by the second section of said act of the said governor and legislative assembly
4 of the Territory of Utah, was given as directed by said section to the settlers and occupants of said city to file their claims for a deed. The court further finds that each of the parties hereto within the time prescribed by law, filed in the probate court of said county, in due form, his statement of right or interest in said lot, and claim for a deed. That the said Ann Lamareaux Dewey, Caroline E. McComb, and Wm. G. Lamareaux filed their claim for the whole of said lot. That the said Wm. H. Folsom, who is a citizen of the United States, filed his claim for a deed of the southwest corner of said lot, embracing seven rods west front, and ten rods south front, being seven rods wide by ten rods long, and George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, filed his claim in behalf of the heirs and devisees of said Samuel C. Snyder, deceased, as provided in said will, for a deed of the east half of said lot, being ten rods south front, and ten rods deep, running north to the north line of said lot.

The court further finds from the agreed statement aforesaid, and from the evidence, that Andrew L. Lamareaux, being a citizen of the United States, and a resident of the city of Salt Lake, in 1848, went into the possession, and became the occupant of said lot, and soon thereafter built a house on the northwest corner of said lot, which house he occupied with his family, consisting of his wife, Isabel Lamareaux, and his children, being the claimants aforesaid, until the month of September, 1852 (the said children and claimants having been respectively born in the years following, to wit: Ann Lamareaux Dewey, in the year 1835, Caroline E. Lamareaux, now by marriage, Caroline E. McComb, in the year 1840, and Wm. G. Lamareaux, in the year 1845), when he left said city and went to France on a mission, intending to return, leaving his family in the occupancy of said house, and the west half of said lot. That he, on his return trip, in St. Louis, Missouri, in June,

1855, departed this life intestate, and that his family aforesaid, continued to occupy the said house until the death of the said Isabel Lamareaux, which took place the 19th day of August, 1872, and the children aforesaid still occupy said house. That no administration was ever granted on the estate of either the said Andrew L. Lamareaux, or the said Isabel Lamareaux, and the said Ann Lamareaux Dewey, Caroline E. McComb, and Wm. G. Lamareaux are the only lawful issue and children of the said Andrew L. and Isabel Lamareaux, deceased, as aforesaid.

5 The court further finds that the said S. C. Snyder, a citizen of the United States, then living, but now dead, entered upon the east half of the east half, to wit, the east quarter of said lot in 1852, under a transfer by David Lamareaux, assented to by the said A. L. Lamareaux, deceased, said transfer having been made in 1851 to Samuel P. Hoyt, and the said Samuel C. Snyder continued in possession thereof until his death, in the year 1866. That said Samuel C. Snyder also obtained possession of the west half of the east half of said lot in 1852, with the assent of A. L. Lamareaux, and continued in such possession until his, the said S. C. Snyder's, death. That Isabel Lamareaux afterwards, to wit, on the 28th day of January, 1853, made a deed in the name of A. L. Lamareux to the west half of the east half of said lot to Samuel C. Snyder, who, and the said George G. Snyder, as executor, made valuable improvements thereon. That the said S. C. Snyder made a will before his death, which was duly probated, and by said will bequeathed the east half of said lot to George G. Snyder, as executor under said will, for the benefit of the heirs of the testator, and that said George G. Snyder, as such executor, continued in possession of the whole of said east half of said lot up to the present time, and has made valuable improvement thereon.

The court further finds from the evidence that on the 11th day of October, 1851, Andrew L. Lamareaux executed a writing which was in the words and figures following, viz:

Brother THOMAS BULLOCK:

I am indebted to Brother Samuel P. Hoyt in sum of ninety dollars, in consideration of a stove; my brother, David Lamareaux, is also indebted to the said Brother Hoyt in the sum of ninety-six dollars, making 186 dollars in all, for the payment of which I wish to give him a lien on my house and half lot, it being the west half of lot two in block sixty-nine. The payment to be made on or before the eleventh day of October, eighteen hundred and fifty-two, otherwise said Smauel P. Hoyt shall have the privilege of selling the said house and half lot, and receiving his pay as specified above. This article to remain with you to prevent any sale of said house and half lot without said Hoyt or his agent receiving the sum above named; the payment of the same to be made in stock or otherwise, as the parties may agree. And providing said debt shall not be paid, you are hereby authorized to transfer the said

6 property to any person the said Hoyt may sell the property to, providing such sale shall be made to the best possible advantage.

In testimony whereof I have hereunto set my hand and seal this eleventh day of October, 1851.

A. L. LAMAREAUX. [SEAL.]

Which said writing was delivered to the said Samuel P. Hoyt, and by the said Hoyt and the said Andrew L. Lamareaux, together, was taken to Thomas Bullock, who, at that time, was the recorder of Salt Lake

County, and left with him, who, on the said writing, endorsed as follows: "Oct. 11, 1851, filed in recorder's office." "A. L. Lamareaux' mortgage to Samuel P. Hoyt, of house and lot."

Afterward, on the 11th day of March, 1860, the said Samuel P. Hoyt, with the knowledge, but without the consent, of the said Isabel Lamareaux, and the said children, to raise the money mentioned in said writing, caused the said southwest corner of said lot, the land claimed by the said Wm. H. Folsom, to be sold at auction, after having given ten days' notice of such sale, by publication in the Deseret News, then a weekly newspaper published in said city, and of general circulation therein; at which said sale the said Samuel C. Snyder became the purchaser for five hundred and ten dollars, which money was paid and applied on the money due on said writing, and the balance to the said Isabel Lamareaux. That said Samuel C. Snyder then, by virtue of said purchase, went into possession thereof, and afterwards, in an early part of February, 1861, sold the same to the said William H. Folsom and put him in possession, who, from that time to the present, has been in the possession thereof and has made valuable improvements thereon. That on the 9th day of February, 1861, no deed having been given to said Samuel C. Snyder of the land so by him bought at said public sale, a deed thereof was made by said Samuel P. Hoyt, who acted by his agent, Elias Smith, to the said Wm. H. Folsom. That there was a verbal but no written authority given by said Samuel P. Hoyt to said Smith to make said deed.

The court being of opinion, as conclusions of law, that the proceedings aforesaid were illegal and void, and did not transfer the right of possession to the said Samuel C. Snyder of the said southwest corner of said lot, nor to the said Wm. H. Folsom, and for this reason his possession thereof is wrongful.

7 And as a further conclusion of law, the court is of the opinion that the said Ann Lamareaux Dewey, Caroline E. McComb, and William G. Lamareaux are entitled to a deed of the whole of the west half of said lot.

And that George G. Snyder, as executor of the will of the said Samuel C. Snyder, deceased, is entitled to a deed of the whole of the east half of said lot, which said last-mentioned deed is to be given in trust for the use and benefit of the devisees and heirs expressed in the said will, and it is accordingly so ordered.

By the court.

M. SCHAEFFER, *Judge.*

Dated September 5th, 1877.

On the same day, to wit, Sept. 5th, 1877, judgment was duly entered in accordance with said findings.

Thereupon, on the same day, the Lamareaux heirs made and filed in said court, in writing, exceptions to portions of the findings of fact, to all of the conclusions of law, and the judgment, as to the east half of said lot.

And on the same day the said Wm. H. Folsom made and filed in said court, in writing, exceptions to a portion of the findings of fact, to all of the conclusions of law and judgment, relating to the seven by ten rods claimed by him.

(These exceptions by both parties were specific and in due form, and the assignments of error hereinafter contained follow the exceptions, and sufficiently point them out.)

Afterward, on the same day, the Lamareaux heirs filed in said court their motion for a new trial, as to the east half of the lot, and the said

Wm. H. Folsom filed his motion for a new trial as to said seven by ten rods; which motions were in due form, and specified the grounds of motion and errors relied on.

Afterward, on the same day, by consent of parties, and on the record and agreed statement filed, the said motions were heard by the court, and an order made and entered in said court, overruling both motions. After the entry of said order, and on the 5th of September, 1877, the Lamareaux heirs filed in said court, in writing, in due form, their exceptions to so much of said order as overruled their motion for a new trial as to the east half of said lot; and the said Wm. H. Folsom
8 filed in said court, in writing, in due form, his exceptions to so much of said order as overruled his motion for a new trial as to the seven by ten rods in the southwest corner of said lot.

An agreed statement for appeal to the supreme court was duly made and filed in said court on the 10th day of September, 1877.

The Lamareaux heirs appeal from so much of the judgment as declares that George G. Snyder is, and that they are not, entitled to a deed for the east half of the lot, and from so much of the order overruling the motion for a new trial, as denies them a new trial as to the said east half of said lot.

Wm. H. Folsom appeals from so much of the judgment as determines that the Lamareaux heirs are, and that he is not, entitled to a deed for the seven by ten rods in the southwest corner of the lot, and from so much of the order refusing a new trial as denies him a new trial as to said seven by ten rods.

In pursuance of the aforesaid exceptions the Lamareaux heirs assign errors as follows:

1st. The court erred in finding as a fact that when A. L. Lamareaux, deceased, went on a mission to France, he left his family in the occupation of the west half of said lot; whereas the evidence shows, and the court should have found, he left his family in the occupation of the whole of said lot.

2d. The court erred in finding as a fact that the said Samuel C. Snyder, deceased, entered on the east half of the east half of said lot in 1852, under a transfer from David Lamareaux, assented to by A. L. Lamareaux, and that the transfer was first made to Samuel P. Hoyt in 1851, and that the said S. C. Snyder remained in possession until his death; whereas the evidence shows, and the court should have found, that the said S. C. Snyder first entered in the fall of 1853, and without the knowledge or consent of A. L. Lamareaux, and that no transfer in 1851, or at any time, was made by David Lamareaux to said Hoyt, and that A. L. Lamareaux had no knowledge of any such transfer.

3d. That the court erred in finding as a fact that said S. C. Snyder obtained possession of the west half of the east half of said lot in 1852, with the assent of A. L. Lamareaux, and continued in possession until his death; whereas the evidence shows, and the court should have found, that the said S. C. Snyder did not enter into possession of
9 said part of said lot earlier than the fall of 1853, and that said entry was without the knowledge or consent of the said A. L. Lamareaux, now deceased.

4th. That the court erred in finding as a conclusion of law that George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, is entitled to a deed of the whole of the east half of said lot, and in not finding that said Lamareaux heirs are entitled to such deed.

5th. The court erred in adjudging that said Lamareaux heirs are not

entitled to a deed for any part of the east half of said lot 2, and that the said George G. Snyder, as such executor, is entitled to such deed.

6th. The court erred in overruling the motion of said Lamareaux heirs for a new trial, as to the east half of said lot.

And the said Wm. H. Folsom, in pursuance of his aforesaid exceptions, assigns errors as follows:

1st. The court erred in overruling his motion to dismiss the appeal from the probate court, on the ground that the law did not provide for or authorize an appeal.

2d. The court erred in finding as a fact that the sale of the seven by ten rods in the southwest corner of said lot, made March 11, 1860, was made without the consent of the said Isabel Lamareaux and the said children, whereas the evidence shows, and the finding should have been, that such sale was with their assent.

3d. The court erred in finding as a conclusion of law that the said sale of said seven by ten rods, on the 11th day of March, 1860, was illegal and void, and did not transfer to said Samuel C. Snyder, nor to the said Wm. H. Folsom, the right of possession to the same, therefore the said possession is wrongful.

4th. The court erred in adjudging that the said Lamareaux heirs are entitled to a deed on the whole of the west half of said lot.

5th. The court erred in overruling the motion of said Wm. H. Folsom for a new trial as to said seven by ten rods of said lots.

10 EVIDENCE.

The following is all the evidence given on the trial in said district court relating to the title to, and occupancy and right of possession of, the east half of said lot.

Stipulation as follows:

The parties by their attorneys agree and stipulate that the following facts are true, as though the same were proved by competent witnesses, and found by the court, subject to the limitations and reservations herein contained.

First. That Andrew L. Lamareaux, in the year 1848, was a citizen of the United States and a resident of Salt Lake, in the Territory of Utah, and as such the said lot 2, in block 69, as plotted in plat A of the Great Salt Lake City survey, in pursuance of the custom and usage then in force in said city, was surveyed and allotted to said A. L. Lamareaux, who was the original and first locator and occupant of said lot.

Second. That in 1848 the said lot was not separated by fence from the adjoining property or lots, the city then being only fenced in wards or blocks. That said Lamareaux lived on the lot in his covered wagon in the fall of 1848, and immediately commenced to build the one-story adobe house still remaining on said lot, and completed the said house during the winter of 1848-'9, and lived therein with his family.

Third. That he continued to reside in and occupy said house until his departure from the Territory, temporarily, on a mission to France, to wit, in the month of September, A. D. 1852.

Fourth. That in the fall of 1850 a substantial post and pole fence was built along the west and south lines of said lot, but the question as to who built said fence is reserved.

Fifth. That at the time of his departure, to wit, in September, 1852, he left the said Isabel and the children in the occupancy of the said house, and the said Isabel and family continued to reside therein.

Sixth. That said A. L. Lamareaux never returned to Salt Lake City

from his mission, but while on his way died intestate, on the 13th day of June, 1855, in the city of St. Louis, in the State of Missouri.

Eighth. That Wm. H. Folsom, in the year 1861, was a citizen of the United States and of the Territory of Utah. That in the month
11 of February, 1861, said Folsom went into actual possession of so much of said lot as is described in the accompanying diagram, being seven rods west front by ten rods south front, and by himself and his tenants has ever since said date been continuously in possession thereof, and has, by himself and tenants, made valuable improvements thereon; but the question as to whether said actual possession was with or without the consent of said Lamareaux claimants is reserved.

Ninth. That Samuel C. Snyder was in the possession of the east half of lot 2, in block 69, plat A, of said city, referred to in the diagram, at the time of his death, which took place on the day of April, 1866, and that he had made valuable and lasting improvements there. That he had been in possession of the same ever since 1853 or 1854, the exact time, prior or subsequent to those dates, to be settled by proof, but the question of the rightfulness of such possession is reserved for proof.

Tenth. That the said Samuel C. Snyder, before his death, made a will, and appointed the said George G. Snyder his executor, who holds said land by virtue of the will, and for the trust therein expressed.

Eleventh. That the said George G. Snyder, ever since the death of the said Samuel C. Snyder, has been, and now is, in the possession of said east half of said lot, and claims title to the same, and holds the improvements thereon as such executor; valuable and lasting improvements thereon having been made since the death of the said Samuel C. Snyder, but the question as to who made said improvements is reserved for proof.

Twelfth. The said Samuel C. Snyder was and the said George G. Snyder is a citizen of the United States.

Thirteenth. Each party reserves the right to introduce proof or testimony concerning any pertinent matter consistent with this agreement.

Agreed to.

(Signed) THOS. FITCH,
Att'y for Wm. H. Folsom.
THOS. FITCH, *For Himself.*
SNOW & HOGE,
Atty's for George G. Snyder and William H. Folsom.
HEMPSTED & KIRKPATRICK
Atty's for heirs of Andrew L. Lamareaux, deceased, claimants.

(Endorsed on back:) Exhibit A.

12 The Lamareaux claimants then put in evidence a deed between Isabel Lamareaux, widow of Andrew L. Lamareaux, deceased; Ann Lamareaux Dewey, wife of John Dewey, daughter and one of the heirs of the said Andrew L. Lamareaux, deceased; Caroline E. L. McComb, wife of Robert McComb, and also daughter and one of the heirs of the said Andrew L. Lamareaux, deceased, and Wm. G. Lamareaux, son and one of the heirs of said Andrew L. Lamareaux, deceased and Ellen A. Lamareaux, wife of the said Wm. G. Lamareaux, and John Dewey and Robert McComb, parties of first part, and John W. Kerr, party of the second part. Said deed bears date the 25th day of November, 1870, conveys lot 2, block 69, plat A, Salt Lake City survey—recites a consideration of four thousand dollars, was acknowledged November 25, 1870, and recorded in the office of the county

recorder of Salt Lake County, Utah, December 14, 1870. Book D, pages 734–5.

Deed marked Exhibit 2.

JOHN W. KERR, a witness called by the Lamareaux heirs, was duly sworn, and testified:

My name is John W. Kerr, age 49 years, and place of residence Salt Lake City, where I have resided over ten years. I am the John W. Kerr named in the deed in evidence.

The Lamareaux heirs then offered in evidence the following agreement, to which the counsel for Folsom and Snyder objected, on the ground that it is irrelevant, it not tending to sustain the issue on the part of said heirs, and that, at law, evidence cannot be received to vary, alter, or change the terms of a written agreement so as to injuriously affect third parties. The objection was overruled and the agreement received in evidence, to which ruling counsel for Folsom and Snyder duly excepted.

Whereas, Isabel Lamareaux, wife of A. L. Lamareaux, deceased, Ann Lamareaux Dewey, Caroline E. Lamareaux McComb, and Wm. G.
13 Lamareaux and wife, heirs of the said Andrew L. Lamareaux, deceased, parties of the first part, have agreed to convey to John W. Kerr, by deed, as a mortgage security, the following described property, viz, lot 2, in block No. 69, Salt Lake City, Utah.

Now then, for said deed so delivered, I, John W. Kerr, hereby agree to advance (on delivery to me, or my agent, of said deed) one thousand (1,000) dollars to said first parties, and I further agree to acquire a government title to said lot, or to so much thereof as said parties are entitled to; and after said government title shall have been acquired to said lot, it shall be sold to the best advantage, at either public or private sale, after having been advertised for thirty days in a Salt Lake City newspaper, unless otherwise agreed upon by said parties interested, reserving therefrom three (3) rods front and extending ten (10) rods back (east) out of the northwest corner of said lot, to remain or be vested in said Wm. G. Lamareaux, and after first deducting and paying to said Kerr said one thousand (1,000) dollars, the balance of proceeds of said sale to be equally divided; that is to say, the one-half to said parties, and the other to Mr. Kerr in lieu of interest on said $1,000, and advances, and expenses incurred; said Kerr to be at all the expenses, of every description, of obtaining said government title, and to be as expeditious as the nature of the case will admit of.

Witness my hand and seal, this fifteenth day of November, 1870.

JOHN W. KERR. [SEAL.]

Witness:
WM. K. SLOAN.

And the witness, under the same objection and exception, further testified:

The deed and agreement were delivered at the same time as parts of one transaction, and at the same time I paid to the grantors in the deed one thousand dollars. The filing for title in the names and behalf of the said Isabel Lamareaux, widow, and said heirs, was with my knowledge and approbation in pursuance of the agreement.

The witness, without objection, testified he never occupied any part of the lot.

14 SAMUEL P. HOYT, sworn as a witness on the part of Folsom, Fitch, and Snyder, testified:

My name is Samuel P. Hoyt; age, 67 years; place of residence, Summit County, Utah. I think, as near as I can recollect, I came to Utah Territory in the fall of 1850 or 1851. I became acquainted with Andrew L. Lamareaux after I came here to Salt Lake City. He had a brother David. I became acquainted with him in Iowa, and knew him here. When I came here Andrew L. Lamareaux lived in Salt Lake City; the name of the lot and block I do not recollect; it is what is known as the Snyder lot. Now Samuel C. Snyder's heirs occupy the east half of the lot, I think. Wm. H. Folsom, I think, occupies the remainder of the lot, except three rods by ten on the northwest corner. Either in 1850 or 1851 I bought, or it was turned over to me on a debt by David Lamareaux, the east half of that lot. David Lamareaux had, I think, a little cabin put up on that half lot, but am not positive that he lived there. I did not go into the house.

I was put in possession of that lot a short time after this by David Lamareaux.

I am acquainted with Thomas Bullock, and was acquainted with him in 1850 or 1851. In 1850 or 1851 he was county recorder of Salt Lake County, Utah, and I think I should know his handwriting. I see his handwriting on the back of the paper writing shown me, marked Exhibit 4, in the following words: "Oct. 11, 1851, filed in recorder's office. A. L. Lamareaux' mortgage to Samuel P. Hoyt of house and lot." I saw this paper on the day of its date, which is the 11th day of October, 1851. Andrew L. Lamareaux showed it to me, and according to my best recollection it was on the lot when me and Mr. Lamareaux were walking over the lot. He told me he wrote the instrument. It was delivered to me Oct. 11th, 1851, by Andrew L. Lamareaux. It was before A. L. Lamareaux went on his mission that David Lamareaux turned over to me on a debt the east half of the lot. After the possession of that part of the lot had been turned over to me by David Lamareaux, I saw A. L. Lamareaux, and had a conversation with him in regard to the half lot; he told me he had sold to and given his brother David possession of that half of the lot. Exhibit 4 was deposited October 11th, 1851, by
15 Andrew L. Lamareaux and myself. I sold the east half of said lot to Sam'l C. Snyder—do not recollect the exact date when I sold it, but think I sold it in the year 1852—who then took possession from me. Beside the improvements I have stated, according to my best recollection there was a slight fence on it. I authorized Elias Smith to make a conveyance of this land to Mr. Snyder. I have seen him write, and should know his signature. The signature (shown witness) is Elias Smith's, and the acknowledgment is in Thomas Bullock's handwriting—the recorder.

Exhibit No. 5 put in evidence. Counsel for Lamareaux' heirs here admits that the signature, "Thomas Bullock," to Exhibit No. 6, shown, is in the handwriting of Thomas Bullock.

Since October 11th, 1851, I have had a talk with Mrs. Isabel Lamareaux, but I cannot remember the time; it seems to me it was somewhere along 1854 and 1855; it was shortly before the sale of the quarter. I went and had a talk with this Isabel Lamareaux in relation to the lot. She seemed to feel very bad about it. I asked the old lady what would satisfy her, and she told me if she could have a small portion of the lot where the house was on, that was all she wanted. I made a proposition to her that if three rods by ten would do her or satisfy her. She said it would. I then went and authorized my agent to relinquish that por-

tion of the half lot; accordingly it was done, so the remainder part was sold at public auction, and the amount paid for that portion of the lot was paid over to my agent, and I received enough to cover the debt due me, and the remainder part was paid over to the widow, as near as I understand. My agent was Elias Smith. I do not recollect the exact dollars and cents due me from Andrew L. Lamareaux. I authorized my agent, Elias Smith, to make conveyance for this part of the lot so sold; it was verbally and not in writing; there was a writing in regard to this account. It is Exhibit No. 4.

(This Exhibit No. 4 is the writing dated Oct. 11, 1859, referred to and copied in the findings of the court.)

Cross-examined by counsel for Lamareaux heirs:

I said I came to Salt Lake City in 1851 or 1852, but I think in
16 1852, in the fall of the year. David Lamareaux was here then. He had a small cabin on this lot. I do not know that he did not live in this cabin. I never was in the cabin to see him in it. I have no recollection about whether the cabin was furnished or had a roof on it. I think I arrived in Salt Lake City the very last of September or early in October, 1852. At that time Andrew L. Lamareaux lived on the northwest corner of the same lot.

When I bought or traded for the east half of the lot from David Lamareaux, I think the agreement was made when we were walking over the lot looking at it. They were owing me for two yoke of oxen and a wagon, a number of other things which I do not recollect, but which I let them have in Iowa, in all amounting to in the neighborhood of four or five hundred dollars. I wanted my pay. He proposed to turn out the half lot. I accepted his proposition, and he then gave me possession of it by leaving of it.

Question. Any other way?

Answer. What passed between us I do not recollect. I know I got possession of it. The recollection whether I gave a receipt has passed from me. I claim no other debt against him.

Q. What did you then do, and how did you take possession?

A. When he left the lot I came in possession by agreement; probably I went over the ground a few times. I did not live on the lot; also, the city taxed me for half the lot; that is, the assessor was after me for city taxes on the lot.

I think I did not go into the cabin or put any door or window in or any roof on that cabin. I do not know. I do not recollect what kind of a cabin that was or what were its dimensions. I did not put any improvements on the lot by fencing or otherwise. As I said before, I was not in the cabin; there was something they called a cabin, to the best of my recollection.

Q. What other improvements were in, on, or around the east half of the lot at that time?

A. I think there was a slight pole fence around it.

I do not recollect whether there was a division fence between the east and west half of the lot. I never lived on the lot. I can't say that I occupied it. I neither planted or sowed on it.

Q. Are you not mistaken when you say you bought from David Lamareaux the east half; was it not the east quarter you bought of him and he put you in possession of it?

17 A. The two transactions of our agreement were so close together that I had possession of the two at the same time.

Q. What two transactions?

A. In the first place, that quarter did not cover the debt. The second—he claimed the other quarter from Andrew L. Lamareaux, his brother—I took the other quarter and cancelled the debt.

The second transaction took place shortly after the other. He put me in possession of the whole after the second transaction. I can only say what he told me when we had our first talk, as to his owning the second quarter; he told me he had arranged with his brother for the other or second quarter, and in conversation with his brother he told me that it was so. These transactions took place some time in the early part of Oct., 1851. I arrived here in 1851. If I said 1852, I was mistaken. I think I am pretty positive I arrived in 1851. I made the trade with David Lamareaux shortly after I arrived. According to the best recollection I have it was in 1852 that I gave possession of part of the lot to Snyder—the east half of the lot. When I first came here I lived in my wagon about three or four weeks, a little way west of Temple Block. I then went down to Fillmore, Millard County. I could not say when I next came to the city. I came so frequent back and forth. I do not recollect whether I came that fall or winter; if I came at all, it was away in the winter, it was late when I went down. I sold the east half of that lot to Sam'l C. Snyder some time during the year 1852. The first east quarter, I understand, was 10 rods front by 5 rods back of the east half of the lot. The second east quarter was the remainder of the east half of said lot, immediately north of the first east quarter. I said before I thought the conversation with the Widow Lamareaux just before the sale was in 1854 or 1855—it might have been in 1855 or 1856. I do not remember how long before the sale it was, but it was not a year. I will tell you why I do not recollect: I was superintending the building of a state house and was frequently back and forth. I do not recollect that the sale took place within a few days after the conversation, nor who was present.

Q. Do you not recollect that the Widow Lamareaux, in that conversation, positively refused to allow the sale of the property?

A. Not to me she did not.

18 JAMES MCKNIGHT, sworn on the part of George G. Snyder, testified:

My name is James McKnight; my age is 43; have resided in Salt Lake City since 1851, and became acquainted with Sam'l C. Snyder in the spring of 1852. Early in the summer of 1852 Mr. Snyder kept a lumber yard near the ground where the livery stable now stands on the block on which Walker Bros.' store is situated. The lumber yard was a little west of where the livery stable now stands. I know this, because I bought a piece of property in the 12th ward of this city in the spring of 1852. Soon after I bought this property I went to Mr. Snyder's yard and purchased lumber from him to make some improvements. I purchased from him personally.

THOMAS LATIMER, sworn on the part of Folson and Snyder, testified:

My name is Thomas Latimer; age, 45; residence, Salt Lake City. I came here in September, 1852. I knew Samuel C. Snyder in his lifetime. I became acquainted with him in the spring of 1853. I hired out to him as a carpenter to finish a small house he had on the east portion of the lot west of Walker Bros.' store. It was a house of two rooms. I do not know whether that house was put up that spring or the winter or fall before. I think that season he started a lumber yard there. I

continued to work for him from that time to the spring of 1854. I knew Isabel Lamareaux and the children of Mrs. Lamareaux. I became acquainted with them previous to 1855. I did not know Mr. A. L. Lamareaux. At the time I went to Mr. Snyder's, in 1853, there was a small adobe building, other than that of Mr. Snyder's, on the eastern part of the lot. I do not know whether it was on the first east quarter or on the quarter on which Mr. Snyder's house was, which was on the west half of the east half of the lot. At that time Mr. Snyder occupied the east half of the lot.

Cross-examined:

19 The house on the extreme east quarter in 1853 was one small room, perhaps 10 by 12 feet, without any roof. I think there were no doors, windows, or floor; there was only the adobe wall there. I do not remember whether there was any fence or not on the eastern half of the lot. I could not say certain, but think there was no fence dividing the east and west half of the lot. The house that I finished was finished during the summer of 1853, and Samuel C. Snyder moved into it as soon as it was finished. He had lumber there and kept a lumber yard towards the fall of 1853. I don't know who occupied the east part of that lot before the fall of 1853.

Re-examined:

Q. I understood you to say, in your examination-in-chief, that at the time you went to Mr. Snyder's, in the spring of 1853, he occupied the east half of said lot; in your answer to the last question of the cross-examination you say you do not know who occupied the east quarter before the fall of 1853. Can you explain what you mean to say?

A. I intended to say I did not know who occupied it before Mr. Snyder.

EDWARD T. MUMFORD, sworn for Folsom and Snyder, testified:

My name is Edward T. Mumford, my age is 64, and I have resided in Salt Lake City ever since 1850. I knew Sam'l C. Snyder. I became acquainted with him in the year 1852. He resided in the 14th ward, on the lot now in dispute, at the time of his death. He went on to the possession of that lot, if my memory serves me right, in 1852. I established a ferry on the Weber River. Our company went to his mill to get the timber. At this time he told me he was going to establish a lumber yard, and told me where it was agoing to be. This is what makes me remember the circumstance. In the spring of 1853 we remained there not more than two or three weeks. We came back to the city, and I went there to the lumber yard. I do not remember the month, whether it was in August or September; there was a lumber yard there then; there was not much lumber; the lumber that was there was hauled by his own teams; probably they would haul two or three loads a month.

20 Cross-examined:

I run the ferry on the Weber River three or four weeks. It was in 1852; in 1851 I ferried on the Green River. I did not run a ferry in 1853. I only run a ferry over the Weber one year. I did not sell the ferry. I think Phineas Young run it the next year, and Cyrus Wheelock after that. To the best of my recollection it was in the spring of 1852 that I run the ferry, and I think it was in the summer or fall of the same year that Samuel C. Snyder established his lumber yard on the lot

in controversy. I will not be positive, but am under the impression there was at that time the walls of a small adobe house there.

GEORGE G. SNYDER, sworn, testified:

My name is George G. Snyder, age 55, residence Wanship, Summit County, Utah. I knew Sam'l C. Snyder in his lifetime; he was my brother, and I am executor of his will. I know the lot in dispute. My brother made the greater portions of the improvements on the east half of the lot, after 1854. I have made some improvements on the lot since my brother's death, such as additions to the house, making the corral and sheds, at about the cost of twelve hundred dollars, including what my brother done and what I have done, and not including the cost of the livery stable.

CAROLINE CHATWIN, sworn on the part of Folsom and others, testified:

My name is Caroline Chatwin, my age is 42 years, and I reside in Provo Valley. I was acquainted with Samuel C. Snyder in his lifetime. I became acquainted with him in the summer of 1851. I then lived in the 14th ward of the city, right across the road south from the lot in controversy. Mr. Snyder's family then lived at Cottonwood. He had the lot then, I think. I cannot say for certain whether he had any lumber there or not. I was married to Mr. Snyder in the fall of 1851. After I was married I went to live at Mrs. Richards', wife of Frank D. Richards. I remained there through the
21 winter. Mrs. Richards then resided about one block south-west of this lot. I remained there till the next spring. I then went to Parley's Park with Mr. Snyder. He had a saw mill there, sawing lumber. He hauled that lumber into the city and used some of it for his own use, and sold some of it. He had his lumber yard where the family of Snyder now live. I know he had it there because I saw it there in the spring of 1852. He was building a house there in the summer of 1852. He did not finish it till the next spring. Thomas Latimer finished it. I moved in there in the spring of 1853. I had children by Mr. Snyder; my oldest son was 21 last February.

Cross-examined:

As near as I can recollect, I first came into the city early in the spring of 1852, from Parley's Park. I think I came down three times that year. I stopped across the street from this lot with Mr. Snyder's sister. He had lumber on this lot in the spring of 1852, when I first came down. I don't know when we moved in—the baby was three or four months old. There was a lumber yard on the premises when we first moved in, it was on the east part of the lot and east of where the house was. The lumber yard in 1852 was in the same place it was in 1853, but it occupied more of the lot in 1853 than it did in 1852.

JANE S. RICHARDS, sworn, testified:

My name is Jane S. Richards, wife of Franklin D. Richards. I am a sister to the late Samuel C. Snyder. I came to this Territory in 1848. I lived in Salt Lake City. I first lived right opposite, south of this lot. I lived there about one year and a half, when I moved to the block west and about ten rods south from the north-east corner. To the best of my recollection my brother, Samuel C. Snyder, put lumber on the lot in controversy in the winter of 1851, in December. I was acquainted with Mr. Andrew L. Lamareaux; he was engaged in the year 1850 and 1851 north, at Farmington, acting as foreman in building a mill for Dr. Wil-

lard Richards. Some of the men engaged in building this mill
22 boarded with me a portion of the time when they came to the city. There was an agreement between A. L. Lamareaux and myself that when the men came to the city I was to board them, and he would settle for it. He would always send a line by the men when he sent them down to me. I acted upon his orders, and he settled the board bill with me.

Exhibit 4 put in evidence.

EDWARD T. MUMFORD, recalled, says:

I live on the south side of the block, south of block 69, and about 48 rods south, on a line, of the lot in controversy. Upon reflection I am confirmed in my statement that it was in 1852 that I ferried across the Weber River.

DAVID B. LAMAREAUX, sworn on the part of the Lamareaux heirs, testified:

My name is David B. Lamareaux, aged 54 years. I reside in Logan City, Cache County. I knew Andrew L. Lamareaux, now deceased; he was my brother. I have known Isabel Lamareaux since about 1833 or 1835. I first knew her in Scarborough, Upper Canada. At that time I lived in Scarborough, and Andrew was living in York Township, about six miles distant. Andrew L. Lamareaux and Isabel were married at my father's house in Scarborough about 40 years ago, and I knew them both; up to the time of their death they continued to live together as husband and wife. There are now living three children of this marriage. Ann Dewey is the eldest, William George, and Caroline McComb. I came to Utah Territory in the fall of 1850. I lived that winter in Salt Lake City, in the 17th ward. The next spring I moved to Farmington. I lived at the mouth of Cottonwood Canyon. I did not live in Salt Lake City after that. I know where Andrew L. Lamareaux lived on the property in controversy. I owned the first half lot north and adjoining Andrew L. Lamareaux' lot. The property is now the Faust property. I became acquainted with Samuel P. Hoyt in the spring of 1851, in a small town or settlement below Montrose, Iowa. I received from him a
23 second-hand wagon, two yoke of steers, and some other articles of the value of about two hundred dollars. I bought them of him on credit. Shortly afterwards I crossed the plains and came to Utah. Hoyt did not come to Utah with me. He came in the fall of 1851. I was then living at Farmington. I came down from Farmington and met him in Salt Lake City. I paid him that fall I thought all I owed him. I think I paid him in tithing orders or by putting it to his credit at the tithing office. I did not at that time or at any time pay him by selling or transferring to him any part of what is now known as lot 2, block 69, Plot A, Salt Lake City survey. At that time A. L. Lamareaux occupied that lot. A portion of the time of 1853 I owned five rods south front by ten deep of the east part of the lot. I traded with Thomas Rogers the spring of 1851, I think, what is now known as the Faust half lot, the same being the half lot adjoining the lot in controversy on the north, for the five rods on the east end of the Lamareaux lot. I never lived on it. There was on the east quarter of the lot a small shell of an adobe house without a roof. I did not at any time occupy the premises. I traded the said east quarter of the lot back to Thomas Rogers that same summer or fall. I never afterwards or otherwise claimed or transferred it to any other person. I had no conversation, talk, or agreement with Samuel P. Hoyt relative to the transfer of

possession of any part of that lot. I never put him in possession of any part of that lot. The next spring, after I paid Hoyt in the fall of 1851, he came from the south and he made an extra claim on me of, I think, about seventy-five dollars, and that was left unsettled. I think I had paid him the fall before from $450 to $500—somewhere there—in tithing. I did not in the fall of 1851, nor have I at any time since, owed Hoyt on any other account than the indebtedness contracted in Iowa. I never had any other deal with him.

Cross-examined:

I was present at the marriage of Andrew and Isabel. The steers I received from Hoyt in Iowa were three years old. There was a cook stove and some groceries. I paid him about $450 or $500 for the property I received, worth about $200, to make him whole and the kind of pay I paid him. I think I saw Mr. Hoyt on the Temple block in this city, and at his wagon west of Temple block. I made the trade
24 with Rogers in the spring of 1851. He was in the occupancy of the east quarter of the lot in 1851. I think he received it from his stepfather. I made the other trade when I turned back this five rod piece, the latter part of the summer or the next fall. During this time Mr. Hoyt was not in the Territory. He was not in the Territory when the trade back was made, but he came in soon afterward, the same fall. I do not remember of seeing him on the east quarter of the lot in the fall of 1851, or spring of 1852, or of ever seeing him on it at all.

Q. Can you say positive you did not?

A. Mr. Hoyt, I think, came to my brother's house. I cannot say positive that I saw him there; when I came to town I stopped at my brother's. I may have seen him there, but do not now remember.

Mr. Rogers now lives at Farmington. I traded that back in the summer or fore part of the fall of 1851. He gave me for it the same half lot that I traded to him. I left him in possession of the place. I think Thomas Rogers put up that cabin; it was on the east quarter. Mr. Rogers was my brother's stepson, and he was married that fall. I do not know how old he was. I do not own that half lot yet. I parted with it to Wm. Gribble, I think, in the summer of 1852. Wm. Gribble is now dead. Mr. Rogers never owned that half lot afterward to my knowledge. I think Mr. Rogers never occupied any more than the east quarter of the lot. I think Mr. Rogers lived with Mr. and Mrs. Lamareaux from the time of their marriage in Canada, up to 1851, as one of the family. I cannot say how it came about when I paid Mr. Hoyt in tithing; I think we went to the tithing office; I cannot tell the particulars, but I think there was deal at the tithing office. The tithing office owed me through Dr. Richards. I do not think any receipts were exchanged between me and Mr. Hoyt; I cannot remember. I could not say what clerk did the business there at that time; they were strangers to me.

THOMAS ROGERS, sworn on the part of the Lamareaux heirs, says:

My name is Thomas Rogers; age, 47; reside at Farmington, Davis County, Utah. I knew Andrew L. Lamareaux. I became ac-
25 quainted with him when I was between six and seven years old. He married my mother in Upper Canada. I lived with him till 1852 as a member of the family. I did not come to Utah with him. I came in 1848, and he and his family came the same fall; about three weeks afterward. He lived in Salt Lake City, and located on the lot in controversy, now known as lot 2, block 69, Plat A, and continued

to live there until he went on his mission in 1852. The family has resided there ever since up to this last winter. Andrew Lamareaux built the house where the family now live. In the fall of 1850 there was a post and pole fence on the south and west sides, built by Andrew L. Lamareaux. I hauled the poles myself. The children living of A. L. and Isabel Lamareaux are, Ann Dewey, who is the eldest, born in Upper Canada in 1834; Carolina E. McComb, born in Ohio in 1840; and William George, born in Nauvoo in 1845. These are the sole surviving children of that marriage. I think Caroline McComb resides in Nevada; the rest reside in this Territory. In the year 1851, until the 28th day of March, I was living with Andrew L. Lamareaux, as a member of the family, on the lot in controversy. I had possession of the east quarter of the lot. Andrew L. Lamareaux gave it to me to build on; I think it was in the spring of 1851. I went on then and put up a small house, early in the spring of 1851. I traded it to David Lamareaux for the half lot north of this lot. I was about to get married, and that is why I wanted to build a house at that time. I did not finish the house before I traded with David Lamareaux. David did not move on the lot or finish the house after I traded. I started to build a house on the half lot north, but the trade did not stick, and we traded back early in the fall of 1851. After that I used the house on the east quarter of the lot for a stable, from time to time, when I came to town, up to the spring of 1853. I moved away from Salt Lake City to Farmington about the middle of April, 1851. I came to the city several times during each of the years 1851, 1852, and 1853, and the most of the time while in the city I stayed on the lot with Andrew L. Lamareaux. I think it was in the fall of 1853 when Samuel C. Snyder first put a lumber yard on the east part of that lot. I never afterward moved on the east quarter or completed the house. When I left the city I let the lot go back to the family.

26 Cross-examination;

Until Andrew L. Lamareaux went on his mission in 1852 he lived in the little house there on the northwest corner of the lot. In the fall of 1852 there was no one in the occupancy of the east half or east part of the lot *in the fall of* 1852 but myself. I used the east quarter, and continued to use it up to 1853. I traded it to David Lamareaux in the spring of 1851, and traded back with him in the same fall. I let it go back to the family in 1853, in the summer. At the time I let this go back to the family there was no one in possession of the next quarter to it. I can tell you how I know it was in the summer of 1853. I was down here a hauling dirt out of the Temple cellar, and I used the house on the east quarter to put my horse-feed in. That is not the only reason. I remember it. I have told you how I remember it, that is not the only reason. There was a neighbor down with me; that makes me remember. It was pretty early in 1853 when I turned it back to the family; we had not commenced plowing. I mean it was the east quarter on which Samuel C. Snyder put a lumber yard in 1853. No one but the family was then in the actual possession of the quarter next to the east quarter. Samuel C. Snyder did not have a house on the quarter next to the east quarter in the fall of 1853. I think he did not have a lumber yard on that quarter in the fall of 1853.

Counsel for the estate of Snyder here put in evidence the last will of Samuel C. Snyder, marked Exhibit 7.

JOHN H. DEWEY, sworn on the part of the Lamareaux heirs, says:

My name is John H. Dewey; I am 42 years old; reside in Salt Lake City, and have resided here most of the time since 1847. I knew Mrs. Isabel Lamareaux in her lifetime. She was my mother-in-law. I married Ann Lamareaux in the year 1855. Mrs. Isabel Lamareaux died in the month of August, 1872. I know Thomas Rogers. At different times I have seen him on the east part of the lot in controversy, with his team, when he came down from Farmington. In the fall of 1852, sometime after the middle of October, I saw him there, with his team
27 unhitched standing at the wagon eating. At that time, except fence, there were the walls of a small adobe building, without roof, on the east part of that lot; that was all. There was no lumber on the lot at that time. If there had been, I think I would be likely to remember it.

Cross-examined:

I was never present to hear more than one conversation between Mrs. Lamareaux and Mr. Hoyt, relating to the sale of the lot. There is this in my mind which makes me remember that it was about the middle of October, 1852, that I saw Mr. Rogers on the east quarter of the lot. He had a conversation in regard to trading horses, and Rogers asked me how I would trade for his horses. I answered my brother had taken the horses with him, and he left between the 15th and 20th of October, 1852. It is according to my recollection that it was in 1852. My brother's name was B. F. Dewey.

DAVID B. LAMAREAUX, recalled on the part of Folsom and others, testified:

I know George G. Snyder, executor of the estate of Samuel C. Snyder, deceased. I saw him in Logan on or about the middle of November last. I had a conversation with him in regard to the whole of this lot. I do not know of any particular part. I might have told him that I traded with my brother, or with Thomas Rogers, some other land for the east quarter of this lot. I did not tell him that I owed S. P. Hoyt for two yoke of cattle and a wagon, and that I turned over to him the east quarter of this lot, or words to that effect. I did not tell him that I owed S. P. Hoyt for two yoke of cattle and a wagon, and that I turned over to him the east quarter of this lot for that indebtedness, and that my brother, Andrew L. Lamareaux, was owing me for services rendered, and turned over to me the other quarter in payment, and that afterwards I turned over the east half or both quarters to Mr. Hoyt for what I was owing him, or words to that effect. I did not tell Mr. George Snyder that my brother was indebted to Mr. Hoyt in the sum of ninety or a hundred dollars for a stove, and that Mr. Hoyt pressed him hard to pay, and that my brother gave him a mortgage for the west half of that lot to secure that indebtedness, or words to that effect.

28 Redirect examination:

George Snyder's object in visiting Logan at the time spoken of was to ascertain whether I knew anything of the transfer of the lot by my brother to Sam'l P. Hoyt. I told him I did not know anything about it. I had not seen a scratch of a pen, or anything about it. It would be hard to tell all that was said. I referred him to Thomas Rogers. I do not remember that he stated to me the substance of the conversation asked me by Judge Snow, and attributed to me, to refresh my recollection. I think he did not ask me to come to Salt Lake to give my

testimony in this case at that time. He may have asked me to come down. I told him I could do him no good, as I had not seen a scratch of a pen or a transfer. I do not know how long he remained in Logan. I conversed with him about one hour. I think my wife was there at the conversation. I could not say that she heard the entire conversation, she might have been absent some of the time. I was not requested or supposed to come as a witness on behalf of the Snyder heirs or of Folsom, prior to my coming back this time.

Recross-examined:

I did not tell George Snyder that it had been transferred to Mr. Hoyt without it being in writing, and that that was the custom at that time. I do not remember saying a word to him about that at that time.

GEORGE G. SNYDER, sworn on the part of Folsom and others, says:

I saw Mr. David B. Lamareaux, concerning the subject of this suit, at Logan City about the 15th of November, 1873, and had a conversation with him about this lot. I inquired of him to know something in relation to a transaction between him and Samuel P. Hoyt. He said that Samuel P. Hoyt sold him two yoke of oxen and a wagon in Iowa in 1850, and that he turned out to Hoyt a portion of the east half, I think it was a quarter of the Lamareaux lot, as that already belonged to him, and also the next joining quarter west he got from his brother on account of services rendered at Farmington Mills. I asked
29 him how he came in possession of the east quarter. He told me he traded a piece of land in the big field with Thomas Rogers as near as he could remember. That he had traded the same property backward and forward with Thomas Rogers a time or two; that is the way he came in possession of it by trading. I asked him if there was any writings passed between them. He said there was not, he had not seen a scratch of a pen; that it was not according to custom generally practiced in exchanging property in those days. There was a woman present, I supposed to be Mrs. Lamareaux, and some little children.

Cross-examined:

The distance from here to Logan is about one hundred miles. My object in going to Logan at that time was to see Mr. Lamareaux on the subject I have stated. I informed Judge Hoge of the statements which I have made here. Judge Snow was not here. I considered Judge Hoge was Judge Snow's partner.

Exhibit No. 6 was duly proved by the deposition of Thomas Bullock, and put in evidence on the part of Snyder.

Deposition of Nancy M. Lamareaux, wife of David B. Lamareaux, of Logan, Cache County, Utah, put in evidence on the part of the Lamareaux heirs, as follows:

My name is Nancy M. Lamareaux, aged 40 years, residence Logan City, Cache County, U. T., and I am the wife of David B. Lamareaux. I never saw Mr. George G. Snyder until last fall; he was at our place, I had an introduction to him, and I think I heard all the conversation between him and my husband. I did not hear anything said about the sale or transfer of the lot known as the Lamareaux lot in Salt Lake City, to any person or persons, or any part thereof. I did not hear anything said by David B. Lamareaux to said Snyder relative to the sale by him to S. P. Hoyt of the east quarter of the east half of said lot in the year 1852 or 1853 in that conversation. If there had been I should

have heard it. I understood the talk to be about what my husband could remember of some sale or transfer by A. L. Lamareaux to Mr. S. P. Hoyt a great many years ago. I did not hear anything of the kind said by David Lamareaux to Snyder, that he had traded a part of
30 that lot to Hoyt in payment of a debt due him for two yoke of oxen and a wagon. I think if anything of that kind had been said I should have heard and remembered it. I do not remember of anything being said relative to the sale of the said lot, or any part thereof, but my husband stated that he knew nothing of any sale or transfer of said lot that would do him, Snyder, any good, and referred him to Thomas Rogers, of Farmington.

Cross-examined:

During the conversation I was in the front room, and my husband and Mr. Snyder were also there. During all the time of the conversation I was not over three feet from them and heard all that was said between them. Mr. Snyder came to our room, and after usual salutations, spoke of his mission and of religious subjects in the first place, and then stated he had come on a matter of business in reference to a certain trade of land in Salt Lake, and asked my husband if he remembered of selling or transferring that lot known as the Lamareaux lot, or any part of it, to S. P. Hoyt, to which my husband replied he had not sold or transferred the said lot, or any part of it, to any one, and that he had never seen a scratch of a pen in reference to the lot.

There was something said in reference to the debt of my husband owed to Mr. Hoyt, and my husband stated to Mr. Snyder that he paid Mr. Hoyt out of the tithing office at Salt Lake City.

Exhibit 4 put in evidence as above stated.

EXHIBIT 4.

Brother THOMAS BULLOCK:

I am indebted to Brother Samuel P. Hoyt in sum of ninety dollars, in consideration of a stove; my brother, David Lamareaux, is also indebted to the said Brother Hoyt in the sum of ninety-six dollars, making 186 dollars in all, for the payment of which I wish to give him a lien on my house and half lot—it being the west half of lot two in block sixty-nine. The payment to be made on or before the eleventh day of October, eighteen hundred and fifty-two, otherwise said Samuel P. Hoyt shall have the privilege of selling the said house and half lot, and receiving
31 his pay as specified above. This article to remain with you to prevent any sale of said house and half lot without said Hoyt or his agent receiving the sum above named. The payment of the same to be made in stock or otherwise, as the parties may agree; and providing said debt shall not be paid, you are hereby authorized to transfer the said property to any person the said Hoyt may sell the property to, providing such sale shall be made to the best possible advantage.

In testimony whereof I have hereunto set my hand and seal this eleventh day of October, 1851.

A. L. LAMAREAUX. [SEAL.]

EXHIBIT 5.

Be it known by these presents that I, Samuel P. Hoyt, the *the* first true and rightful claimant and owner of possession of east quarter of

lot two, in block sixty-nine, containing fifty square rods as platted in the Great Salt Lake City survey, in Great Salt Lake County, in the Territory of Utah, do for and in consideration of the sum of one hundred and fifty dollars, to me in hand paid by Samuel Snyder, the receipt whereof is hereby acknowledged, sell, release, quitclaim and transfer all my right of claim, interest and possession of and to the aforesaid premises to the said Samuel Snyder, heirs or assigns, the twenty-fifth day of October, in the year of our Lord one thousand eight hundred *hundred* and fifty-four.

SAMUEL P. HOYT,
By his att'y in fact, E. SMITH.

Acknowledged before me,

THOMAS BULLOCK,
Recorder, Great Salt Lake County.

EXHIBIT C.

Be it known by these presents, that I, Andrew L. Lamareaux,
32 the first true and rightful claimant and owner of possession of lot 2, block 69, containing one and a quarter acres, as platted in the Great Salt Lake City survey, in Great Salt Lake county, in the Territory of Utah, do for and in consideration of the sum of one hundred dollars, to me in hand paid by Samuel Snyder, the receipt whereof is hereby acknowledged, sell, release, quitclaim and transfer all my right of claim, interest and possession of the second east quarter of the aforesaid premises to the said Samuel Snyder, his heirs or assigns, this 28th day of January, in the year of our Lord, one thousand eight hundred and fifty-three.

ANDREW L. LAMAREAUX,
By ISABEL LAMAREAUX.

Acknowledged before me,

THOMAS BULLOCK,
Recorder, Great Salt Lake County.

EXHIBIT 7.

(This is the last will of Samuel C. Snyder, and is omitted, the right of George G. Snyder, as executor, to represent the estate and heirs not being questioned.)

The following is all the evidence given on the trial in said court relating to the assent or dissent of the said Isabel Lamareaux and children, to the sale of the seven by ten rods in the southwest corner of said lot, on the 11th day of March, A. D. 1860, to wit:

JOHN H. DEWEY, a witness called by the Lamareaux heirs, testified:

I knew Samuel P. Hoyt.

Seven by ten rods of the southwest corner of the lot now in dispute was sold at auction between the first of March and the last of May, 1860.

33 I was at that sale.

Before that sale I was sent for Mrs. Lamareaux to go to her house. I went there and was introduced to Mr. S. P. Hoyt, who was then there. Mr. Hoyt said he had come to have Mrs. Lamareaux consent to the sale of the lot to pay a debt of a hundred and eighty some

odd dollars. I do not remember the exact amount. Mrs. Lamareaux asked my advice, what I thought she had better do. I told her if she felt like doing so to do it, if not, not to do it; she then told me she did not feel willing to do it; she then said to Mr. Hoyt, my answer to you is I shall not consent to the sale of the property. Mr. Hoyt then said he had a mortgage on it and the law will allow him to sell it; she then said to Mr. Hoyt, it is the first time you ever claimed to have a mortgage on it, and I do not think you can produce one. The conversation ended, and Mr. Hoyt went out and measured by steps, commencing at the southwest corner, running north. In the first place he stepped what he called five rods; he then stated to me that he thought would not sell for enough to pay the debt and interest; he finally stepped off another rod; he was a little afraid that would not sell for enough, then he stepped off another rod and drove down a stake; that ended that part of it till the sale took place. This took place some time before the sale, between the middle of February and the latter part of May, 1860. I cannot fix the date.

Cross-examination:

I was never present to hear more than one conversation between Mr Hoyt and Mrs. Lamareaux, concerning the sale. Mr. Hoyt did not at that time or any other time, to my knowledge, show to Mrs. Lamareaux an instrument of writing which he called a mortgage, nor did he ever show to any of us an instrument of writing; Mrs. Lamareaux was in the house when Mr. Hoyt stepped off that land; I was out with Mr. Hoyt, but I did not have anything to do with the stepping it off. I was looking on. It seems in my mind that Mr. W. W. Phelps was with him. I do not remember of any other person. Mrs. Lamareaux did not consent to sell a part of the lot in my presence. I remained there, I should think, about two hours. Mr. Hoyt went away before I did and Mr. Phelps went with him. Mr. Hoyt did not go into the house after he measured off the land; if he had I think I
34 should have seen him. I do not remember of Mrs. Lamareaux going out of doors when Mr. Hoyt was measuring land, but I am not positive; I was paying more attention to Mr. Hoyt's measuring off the land than I was to watching the doors to see Mrs. Lamareaux. From the time I got there till Mr. Hoyt left I should judge was about one hour; a part of this time I was in the house and a part of the time out of doors. There was nothing particular about Mr. Hoyt which caused me to watch him.

THOMAS LATIMER testifies:

I was present at a public sale of a portion of this lot which took place in 1860 or 1861, I am not sure. It was 7 by 10 rods of the southwest corner. It was sold for five hundred and ten dollars. Mr. S. C. Snyder paid for this part of the lot to Mrs. Lamareaux and her son one yoke of oxen, one wagon, one small pig, one pig-pen, and some store goods.

Cross-examined:

The way I know Mr. Snyder paid Mrs. Lamareaux the oxen and other articles mentioned by me was that I kept Mr. Snyder's books. I built the pig-pen myself. The oxen were delivered over Jordan at Mr. Snyder's farm. I put the transaction on the books. I do not know the exact amount or value of the articles charged on the books; it was something less than two hundred dollars. This is all I know about it.

Afterward, and before certifying to this statement herein, after each party filed a notice of appeal in this case to the supreme court of the

Territory of Utah, and served the same on the adverse party, and in due time filed the undertaking on appeal, which said notices of appeal and undertakings were sufficient in form and substance.

We certify that the foregoing abstract from the record and statement on appeal is satisfactory and agreed upon. That it contains all the evidence relating to or bearing upon the facts found and excepted
45 to by either party, and that the condensed statement of the case is sufficient to advise the court of its condition, and the questions raised by the appeals, and is a correct general statement of the case.

Dated Oct. 20th, 1877.

BENNETT & HARKNESS,
Attorneys for Lamareaux' Heirs.

SNOW & HOGE,
Attorneys for W. H. Folsom and George G. Snyder, Executor of the Will of Samuel G. Snyder, deceased.

36 And afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City on the 14th day of January, A. D. 1878, proceedings were had in said court and said cause, and entered in the records of said court, as follows:

MONDAY, *January 21st, A. D.* 1878.

A session of the supreme court of the Territory of Utah was held this day, beginning at 10 o'clock a. m. Present, all the justices, the clerk, marshal, and members of the bar. The court was duly opened.

* * * * * * *

IN THE MATTER OF THE CONTEST FOR DEED FOR lot 2, block 69, plat A, Salt Lake City, between Ann L. Dewey et al., appellants,
and
GEORGE G. SNYDER, EX'R, ET AL., RESPONDents.

From 3d dist.

This cause coming on regularly for hearing, was argued by T. Snow, esq., and R. Harkness, esq., submitted, and taken under advisement by the court.

37 MONDAY, *February 11th, A. D.* 1878.

A session of the supreme court of the Territory of Utah was held this day beginning at two o'clock p. m. Present, all the justices, the clerk, marshal, and members of the bar. The court was duly opened.

* * * * * * *

IN THE MATTER OF THE CONTEST FOR DEED of part of lot 2, block 69, plat A, Salt Lake City, between Ann L. Dewey et al., appellants,
and
GEORGE G. SNYDER, EX'R, ET AL., RESPONDents.

From 3d dist.

This cause having been heretofore argued and submitted, and the

court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgement of the district court therein be, and the same is hereby, affirmed, with costs.

(Also under same date.)

38 IN THE MATTER OF THE CONTEST FOR deed of lot 2, block 69, plat A, Salt Lake City, beAnn L. Dewey et al., appellants, *and* GEORGE G. SNYDER, EX'R, ET AL., respondents.

From 3d dist.

In this cause T. Snow, esq., in behalf of the party Folsom, in open court petitioned for and gave notice of an appeal to the Supreme Court of the United States from the judgement by this court this day rendered therein, upon consideration whereof such appeal was by this court allowed.

39 And on the 11th day of February, A. D. 1878, was filed in the office of said clerk of the supreme court of Utah Territory the opinion of said court in said cause, of which and endorsements thereon the following is a copy, to wit:

40 In the supreme court of Utah Territory. January term, 1878.

ANN L. DEWEY ET AL., APPELLANTS, *vs.* GEORGE G. SNYDER, EXECUTOR, &C., respondent.

also

WILLIAM H. FOLSOM, APPELLANT, *vs.* ANN L. DEWEY ET AL., RESPONDENTS.

Appeals from 3d district court.

BOREMAN, justice, delivered the opinion of the court:

These are "town site" cases respecting the same lot. Ann L. Dewey et al. (heirs of Andrew L. Lamareaux) claim title to the whole of lot 2, block 69, plat A, Salt Lake City survey, George G. Snyder claims title to the east half of said lot, and William H. Folsom claims title to that portion of the west half embracing the southwest corner and being seven rods west front, and ten rods south front.

These parties filed their separate claims in the probate court for the portions of the lot to which they sought title under the "town site" law. The whole matter respecting all of these claims was appealed
41 to the district court. Findings of fact and conclusions of law were made by the district court, and by the judgement of that court the whole of the west half of the lot was granted to the Lamareaux heirs, and the whole of the east half was granted to George G. Snyder, executor of the will of S. C. Snyder, dec'd.

The Lamareaux heirs filed their mytion for a new trial as to the east half of said lot, and William H. Folsom filed his motion for a new trial as to the seven by ten rods of the west half *half* claimed by him. Both motions were overruled. And the Lamareaux heirs appealed from so much of the judgement as had reference to the east half of the lot, and from so much of the order overruling the motion for new trial as denies a new trial as to said east half lot.

William H. Folsom appealed from so much of the judgement as gave to the Lamareaux heirs the seven by ten rods claimed by him out of the west half, and from so much of the order overruling the motion
42 for new trial as denies a new trial to him as to said seven by ten rods.

Upon a careful examination of the testimony, we are at a loss to see why either of these appeals is brought to this court. The evidence is very conflicting, and upon every point which either party has raised there is a conflict in the testimony. Where there is a substantial conflict of testimony upon the material points in dispute this court will not interfere with the judgement of the court below. The findings must stand. The judgement of the court below is affirmed with costs.

(Endorsed:) In supreme court, January term, 1878. Ann L. Dewey et al., appellants vs. George G. Snyder, executor, respondent. Wm. H. Folsom, appellant vs. Ann L. Dewey et al., respondents. Opinion of the court by Boreman, Justice.

Filed in my office February 11th, 1878.

E. T. SPRAGUE,
Clerk Sup. Court.

Recorded on pages 93–4 of opinions.

E. T. SPRAGUE, *Clerk.*

43 And on the 19th day of February, 1878, was filed in the office, the clerk of said supreme court of said Territory, a bond on appeal in said cause, of which and endorsements thereon the following is a copy, to wit:

44 Know all men by these presents that we, Hyrum P. Folsom and Hinman D. Folsom, of the city and county of Salt Lake and Territory of Utah, are heldand firmly bound unto Caroline E.McComb, Ann Lamareaux Dewey and William G. Lamareaux, in the sum of three hundred dollars, for the payment of which we and each of us jointly bind ourselves, our heirs, executors, and administrators, and each of them, firmly by these presents. Signed with our hands and sealed with our seals this 16th day of February, A. D. 1878.

The condition of this obligation is such, that whereas at the January term of the supreme court of the Territory of Utah, begun and held on the 11th day of January, A. D. 1878, at Salt Lake City, in the county of Salt Lake and Territory of Utah, in a case pending in said court on appeal, wherein William H. Folsom was appellant and the said Caroline E. McComb, Ann Lamareaux Dewey and William G. Lamareaux were respondents, in a contest for a deed of a part of lot number two in block number sixty-nine, plot A, Salt Lake City survey, the said supreme
45 court rendered a judgement affirming the judgement of the district court of the third judicial district of the Territory of Utah, rendered on the 5th day of September, A. D. 1877, by which it was adjudged and decreed that the said William H. Folsom was not entitled and the said Caroline E. McComb, Ann Lamareaux Dewey and William G. Lamareaux were entitled to a deed for the southwest corner of said lot,

being a south front ten rods and west front seven rods, containing seventy square rods of ground; from which said judgement of affirmance the said William H. Folsom, in open court, prayed an appeal to the Supreme Court of the United States, to be holden in the city of Washington on the second Monday of October next, which appeal was allowed by the court.

Now, therefore, if he, the said William H. Folsom, shall prosecute his said appeal with effect and shall pay all costs and damages in case he fail to make good his said plea, then this obligation shall be void; otherwise to be in full force and effect.

HYRUM P. FOLSOM. [SEAL.]
HINMAN D. FOLSOM. [SEAL.]

46 TERRITORY OF UTAH,
Salt Lake County, ss:

Hyrum P. Folsom and Hinman D. Folsom, being each duly sworn, each for himself and not one for the other on his oath deposes and says that he is worth the sum specified in the foregoing bond, as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt by law from execution, and is a householder and freeholder in said county; and further says not.

HYRUM P. FOLSOM.
HINMAN D. FOLSOM.

Subscribed and sworn to before me this 19th day of February, A. D. 1878.

[SEAL OF COURT.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Approved by me this 19th day of February, A. D. 1878.
MICHAEL SCHAEFFER,
Chief Justice of Sup. Court of Utah Territory.

(Endorsed:) Snyder vs. Dewey. Bond on appeal. Filed in my office this 19th day of February,, 1878. E. T. Sprague, clerk sup. court.

47 TERRITORY OF UTAH,
Salt Lake County, ss:

I, Ezra T. Sprague, clerk of the supreme court of said Territory, in pursuance of the appeal taken in the matter of the contest for a deed for lot 2, block 69, plat A, Salt Lake City survey, do hereby return to the Supreme Court of the United States the foregoing attached transcript of the abstract of the record and of the proceedings in and of the supreme court of said Territory, of the opinion of said last-named court, and bond on appeal, all in the matter aforesaid; and I hereby certify that said transcript of the abstract of record, proceedings, opinion, and bond is a true, full, complete, and correct copy of the several originals thereof and endorsements thereon on file or of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of said Territory, at Salt Lake City, this 13th day of September, A. D. 1878.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsement on cover:) No. 253. William H. Folsom, appellant vs. Ann L. Dewey et al. Utah Terr'y sup. court. Filed 11th October, 1878.

OFFICE SUPREME COURT U.S.
FILED
DEC 22 1880

Supreme Court of the United States

OCTOBER TERM, 1880.

No 253.

WILLIAM H. FOLSOM,
Appellant.
vs.
ANN L. DEWEY, *et al.*
Appellees.

Appeal from the Supreme Court of the Territory of Utah.

ABSTRACT OF THE CASE AND APPELLANT'S BRIEF.

SNOW & HOGE,
For the Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 253.

WILLIAM H. FOLSOM,
Appellant.
vs.
ANN L. DEWEY, *et al.*
Appellees.

This case, in the Court below, as there were cross appeals, was entitled:

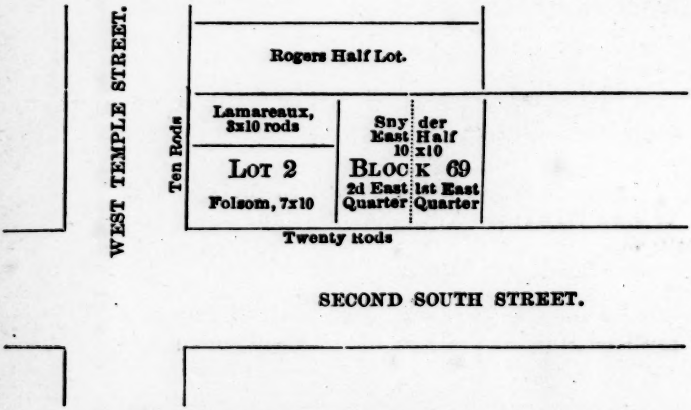
ANN L. DEWEY, CAROLINE E. McCOMB and WM. G. LAMAREAUX, Claimants of the whole Lot,
Appellants.
vs.
GEORGE G. SNYDER, Executor, Claimant of the East Half of the Lot,
Respondent.

WILLIAM H. FOLSOM, Claimant of Seven by Ten Rods of said Lot,
Appellant.
vs.
ANN L. DEWEY, CAROLINE E. McCOMB and WM. G. LAMAREAUX, Claimants of the whole Lot,
Respondents.

In the matter of the contest for a deed for Lot 2, Block 69, Plot A, Salt Lake City survey.

The case originated in the Probate Court of Salt Lake County, under the Act of Congress of March 2, 1867 (14 Stat., 541), and of Utah, of February 17, 1869), (Stat. 1876, 379), familiarly called *townsite acts*.

To show to the Court the whole case, we commence with the Probate Court as it appears in this record. It, as before said, is a contest for a deed or deeds of Lot 2, Block 69, Plot A, Salt Lake City survey; is twenty rods long, east and west, and ten rods wide, north and south, with a south front of twenty rods on Second South Street, and a west front of ten rods on West Temple Street, and is bounded east and north by other lots of the same block. This diagram approximately shows the situation of the lot, and its several parts in contest:



In the Probate Court, Isabel Lamareaux, widow, and Ann L. Dewey, Caroline E. McComb and Wm. G. Lamareaux, children and heirs-at-law of Andrew L. Lamareaux, deceased, filed their statement and claim for the whole lot. Pending proceedings in that court, Isabel Lamareaux, the widow, died, and by an order of the court, further proceed-

ings are prosecuted in the names of said children and heirs, who, for brevity, are herein called Lamareaux heirs.

William H. Folsom filed in said court his statement and claim for seven rods west front, by ten rods south front, in the southwest corner of the lot.

George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, filed in said court his statement and claim for the east half of said lot.

By the judgment of the Probate Court, duly rendered on the 11th day of June, 1874, the Lamareaux heirs were adjudged entitled to a deed for three rods west front, by ten rods long, off the north part of the west half of the lot.

William H. Folsom was adjudged entitled to a deed for seven rods west front, by ten rods south front, in the southwest corner of the lot.

George G. Snyder, as executor of the will of S. C. Snyder, deceased, was adjudged entitled to deed for the east half of the lot.

Printed Record, p. 2.

By the above, this Court will see that the Lamareaux heirs are entitled to the deed of that part of the lot in the diagram above marked, "Lamareaux, 3x10 rods." Therefore, this part of the lot is now out of this case.

The judgment of the Probate Court was rendered June 11, 1874.

Printed Record, p. 2.

From so much of the judgment of the Probate Court as determined the right to deeds for the east half, and seven by ten rods in the southwest corner of the lot, the Lamareaux heirs, on the 29th day of August, 1874, appealed to the District Court for the Third Judicial District of said Territory, and procured the record filed in that court.

The act of Congress entitled "An Act in relation to Courts and Judicial Officers in the Territory of Utah," approved June 23, 1874, having been passed twelve days after the Probate Court rendered its judgment in this case, and near

three months before any steps were taken on the appeal to the District Court, and no rules having been adopted by the Supreme Court of the Territory of Utah providing for appeals, as provided in sec. 6 of this act, Folsom filed a motion in the District Court to dismiss the appeal, which was overruled, and excepted to by Folsom.

Printed Record, p. 3.

A trial was afterward had in the District Court, which court, September 5, 1877, found the facts and conclusions of law, as follows:

This case came on to be heard on the agreed statement of facts filed in the Probate Court on the 25th day of March, 1874, as well as upon the agreement of counsel filed in this case, in this court, on the 29th day of December, 1874, and the testimony produced in court. After it was argued by the respective parties, the court, upon consideration, find that the land in controversy is a part of Salt Lake City survey. That it was declared upon by Daniel H. Wells, Mayor of Salt Lake City, on the 21st day of November, 1871, pursuant to the act of Congress entitled "An Act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2d, 1867, and of the Governor and Legeslative Assembly of the Territory of Utah, entitled "An Act prescribing rules and regulations for the execution of the trust arising under the aforesaid act of Congress," approved February 17th, 1869, and that a patent has been issued therefor to said Mayor.

The court further finds that the notice contemplated by the second section of said act of the said Governor and Legislative Assembly of the Territory of Utah, was given as directed by said section, to the settlers and occupants of said city to file their claims for a deed. The court further finds that each of the parties hereto, within the time prescribed by law, filed in the Probate Court of said county, in due form, his statement of right or interest in said lot, and claim for a deed. That the said Ann Lamareaux Dewey,

Caroline E. McComb, and Wm. G. Lamareaux filed their claim for the whole of said lot. That the said Wm. H. Folsom, who is a citizen of the United States, filed his claim for a deed of the southwest corner of said lot, embracing seven rods west front, and ten rods south front, being seven rods wide by ten rods long, and George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, filed his claim in behalf of the heirs and devisees of said Samuel C. Snyder, deceased, as provided in said will, for a deed of the east half of said lot, being ten rods south front, and ten rods deep, running north to the north line of said lot.

The court further finds from the agreed statement aforesaid, and from the evidence, that Andrew L. Lamareaux, being a citizen of the United States, and a resident of the City of Salt Lake, in 1848, went into the possession and became the occupant of said lot, and soon thereafter built a house on the northwest corner of said lot, which house he occupied with his family, consisting of his wife, Isabel Lamareaux, and his children, being the claimants aforesaid, until the month of September, 1852 (the said children and claimants having been respectively born in the years following, to wit: Ann Lamareaux Dewey in the year 1835, Caroline E. Lamareaux, now, by marriage, Caroline E. McComb, in the year 1840, and Wm. G. Lamareaux in the year 1845), when he left said city, and went to France on a missson, intending to return, leaving his family in the occupancy of said house, and the west half of said lot. That he, on his return trip, in St. Louis, Missouri, in June, 1855, departed this life, intestate, and that his family aforesaid continued to occupy the said house until the death of the said Isabel Lamareaux, which took place the 19th day of August, 1872, and the children aforesaid still occupy said house. That no administration was ever granted on the estate of either the said Andrew L. Lamareaux, or the said Isabel Lamareaux, and the said Ann Lamareaux Dewey, Caroline E. McComb, and Wm. G. Lamareaux are the only lawful issue and children of the said Andrew L. and Isabel Lamareaux, deceased, as aforesaid.

The court further finds that S. C. Snyder, a citizen of the United States, then living, but now dead, entered upon the east half of the east half, to wit: the east quarter of said lot, in 1852, under a transfer by David Lamareaux, assented to by the said A. L. Lamareaux, deceased, said transfer having been made in 1851, to Samuel P. Hoyt, and the said Samuel C. Snyder continued in possession thereof until his death, in the year 1866. That said Samuel C. Snyder also obtained possession of the west half of the east half of said lot in 1852, with the assent of A. L. Lamareaux, and continued in such possession until his, the said S. C. Snyder's death. That Isabel Lamareaux afterwards, to wit: on the 28th day of January, 1853, made a deed in the name of A. L. Lamareaux, to the west half of the east half of said lot to Samuel C. Snyder, who, and the said George G. Snyder as executor, made valuable improvements thereon. That the said S. C. Snyder made a will, before his death, which was duly probated, and by said will bequeathed the east half of said lot to George G. Snyder, as executor under said will, for the benefit of the heirs of the testator, and that said George G. Snyder, as such executor, continued in possession of the whole of said east half of said lot up to the present time, and has made valuable improvements thereon.

The court further finds from the evidence that on the 11th day of October, 1851, Andrew L. Lamareaux executed a writing, which was in the words and figures following, viz:

Brother Thomas Bullock. I am indebted to Brother Samuel P. Hoyt in sum of ninety dollars, in consideration of a stove; my brother, David Lamareaux, is also indebted to the said Brother Hoyt in the sum of ninety-six dollars, making 186 dollars in all, for the payment of which I wish to give him a lien on my house and half lot—it being the west half of lot two in block sixty-nine. The payment to be made on or before the eleventh day of October, eighteen hundred and fifty-two, otherwise said Samuel P. Hoyt shall

have the privilege of selling the said house and half lot, and receiving his pay as specified above. This article to remain with you to prevent any sale of said house and half lot without said Hoyt or his agent receiving the sum above named. The payment of the same to be made in stock or otherwise, as the parties may agree, and providing said debt shall not be paid, you are hereby authorized to transfer the said property to any person the said Hoyt may sell the property to, providing such sale shall be made to the best possible advantage.

In testimony whereof I have hereunto set my hand and seal this eleventh day of October, 1851.

A. L. LAMAREAUX. [SEAL.]

Which said writing was delivered to the said Samuel P. Hoyt, and by the said Hoyt and the said Andrew L. Lamareaux, together, was taken to Thomas Bullock, who, at that time, was the Recorder of Salt Lake County, and left with him, who, on the said writing, endorsed as follows: "Oct. 11, 1851, filed in Recorder's Office." "A. L. Lamareaux' Mortgage to Samuel P. Hoyt, of house and lot."

Afterward, on the 11th day of March, 1860, the said Samuel P. Hoyt, with the knowledge, *but without the consent, of the said Isabel Lamareaux, and the said children*, to raise the money mentioned in said writing, caused the said southwest corner of said lot, the land claimed by the said Wm. H. Folsom, to be sold at auction, after having given ten days' notice of such sale, by publication in the *Deseret News*, then a weekly newspaper published in said city, and of general circulation therein; at which sale the said Samuel C. Snyder became the purchaser, for five hundred and ten dollars, which money was paid and applied on the money due on said writing, *and the balance to the said Isabel Lamareaux*. That said Samuel C. Snyder then, by virtue of said purchase, went into possession thereof, and afterwards, in an early part of February, 1861, sold the same to the said William H. Folsom, and put him in possession, who from that time to the present has been in pos-

session thereof and has made valuable improvements thereon. That on the 9th day of February, 1861, no deed having been given to said Samuel C. Snyder, of the land so by him bought at said public sale, a deed thereof was made by said Samuel P. Hoyt, who acted by his agent, Elias Smith, to the said Wm. H. Folsom. That there was a verbal but no written authority given by said Samuel P. Hoyt to said Smith, to make said deed.

The court being of opinion, as conclusions of law, that the proceedings aforesaid were illegal and void, and did not transfer the right of possession to the said Samuel C. Snyder of the said southwest corner of said lot, nor to the said Wm. H. Folsom, and for this reason his possession thereof is wrongful.

And as a further conclusion of law, the court is of the opinion that the said Ann Lamareaux Dewey, Caroline E. McComb, and Wm. G. Lamareaux are entitled to a deed of the whole of the west half of said lot.

And that George G. Snyder, as executor of the will of the said Samuel C. Snyder, deceased, is entitled to a deed of the whole of the east half of said lot, which said last mentioned deed is to be given in trust for the use and benefit of the devisees and heirs expressed in the said will, and it is accordingly so ordered.

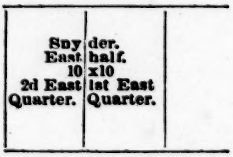
By the Court.

M. SCHAEFFER, Judge.

Dated September 5th, 1877.

Printed Record, p. 3 to p. 7.

The District Court having ordered a deed to be given to George Snyder as executor, etc., of the east half of the lot, which by the diagram is as follows:



and the balance to the Lamareaux heirs. The following proceedings were then taken:

On the same day, to wit, Sept. 5th 1877, judgment was duly entered in accordance with said findings.

Thereupon, on the same day, the Lamareaux heirs made and filed in said court, in writing, exceptions to portions of the findings of fact, to all of the conclusions of law, and the judgment, as to the east half of said lot.

And on the same day the said Wm. H. Folsom made and filed in said court, in writing, exceptions to a portion of the findings of fact, to all of the conclusions of law and judgment, relating to the seven by ten rods claimed by him.

[These exceptions by both parties were specific and in due form, and the assignments of error hereinafter contained follow the exceptions, and sufficiently point them out.]

Afterward, on the same day, the Lamareaux heirs filed in said court their motion for a new trial, as to the east half of the lot, and the said Wm. H. Folsom filed his motion for a new trial as to said seven by ten rods, which motions were in due form, and specified the grounds of motion and errors relied on.

Afterward, on the same day, by consent of parties, and on the record and agreed statement filed, the said motions were heard by the court, and an order made and entered in said court, overruling both motions. After the entry of said order, and on the 5th of September, 1877, the Lamareaux heirs filed in said court, in writing, in due form, their exceptions to so much of said order as overruled their motion for a new trial as to the east half of said lot; and the said Wm. H. Folsom filed in said court, in writing, in due form, his exceptions to so much of said order as overruled his motion for a new trial as to the seven by ten rods in the southwest corner of said lot.

An agreed statement for appeal to the Supreme Court was duly made and filed in said court on the 10th day of September, 1877.

The Lamareaux heirs appeal from so much of the judg-

ment as declares that George G. Snyder is, and that they are not, entitled to a deed for the east half of the lot, and from so much of the order overruling the motion for a new trial, as denies them a new trial as to the said east half of said lot.

Wm. H. Folsom appeals from so much of the judgment as determines that the Lamareaux heirs are, and that he is not entitled to a deed for the seven by ten rods in the southwest corner of the lot, and from so much of the order refusing a new trial, as denies him a new trial as to said seven by ten rods.

In pursuance of the aforesaid exceptions the Lamareaux heirs assign errors as follows:

1st. The court erred in finding as a fact that, when A. L. Lamareaux, deceased, went on a mission to France, he left his family in the occupation of the west half of said lot; whereas the evidence shows, and the courts should have found, he left his family in the occupation of the whole of said lot.

2d. The court erred in finding as a fact that the said Samuel C. Snyder, deceased, entered on the east half of the east half of said lot in 1852, under a transfer from David Lamareaux, assented to by A. L. Lamareaux, and that the transfer was first made to Samuel P. Hoyt, in 1851, and that the said S. C. Snyder remained in possession until his death; whereas the evidence shows, and the court should have found, that the said S. C. Snyder first entered in the fall of 1853, and without the knowledge or consent of A. L. Lamareaux, and that no transfer in 1851, or at any time, was made by David Lamareaux to said Hoyt, and that A. L. Lamareaux had no knowledge of any such transfer.

3d. That the court erred in finding as a fact that said S. C. Snyder obtained possession of the west half of the east half of said lot, in 1852, with the assent of A. L. Lamareaux, and continued in possession until his death; whereas the evidence shows, and the court should have found, that the said S. C. Snyder did not enter into possession of said part of said lot earlier that the Fall of 1853, and that

said entry was without the knowledge or consent of the said A. L. Lamareaux, now deceased.

4th. That the court erred in finding as a conclusion of law that George G. Snyder, as executor of the will of Samuel C. Snyder, deceased, is entitled to a deed of the whole of the east half of said lot, and in not finding that said Lamareaux heirs are entitled to such deed.

5th. The court erred in adjudging that said Lamareaux heirs are not entitled to a deed for any part of the east half of said lot 2, and that the said George G. Snyder, as such executor, is entitled to such deed.

6th. The court erred in overruling the motion of said Lamareaux heirs for a new trial, as to the east half of said lot.

And the said Wm. H. Folsom, in pursuance of his aforesaid exceptions, assigns errors as follows:

1st. The court erred in overruling his motion to dismiss the appeal from the Probate Court, on the ground that the law did not provide for or authorize an appeal.

2d. The court erred in finding as a fact that the sale of the seven by ten rods in the southwest corner of said lot, made March 11, 1860, was made without the consent of the said Isabel Lamareaux and the said children, whereas the evidence shows, and the finding should have been, that such sale was with their assent.

3d. The conrt erred in finding as a conclusion of law that the said sale, of said seven by ten rods, on the 11th day of March, 1860, was illegal and void, and did not transfer to said Samuel C. Snyder, nor to the said Wm. H. Folsom, the right of possession to the same, therefore the said possession is wrougful.

4th. The court erred in adjudging that the said Lamareaux heirs are entitled to a deed on the whole of the west half of said lot.

5th. The court erred in overruling the motion of said Wm. H. Folsom for a new trial as to said seven by ten rods of said lot.

Printed Record commencing on page 5 and ending on page 7.

The case was then taken by appeal to the Supreme Court of the Territory, which court affirmed the judgment of the District Court.

Folsom appealed to this court, but the Lamareaux heirs have not appealed.

This leaves the east half of the lot out of this case.

BRIEF OF FOLSOM.

Assignment of Errors.

There are errors in the records and proceedings of the Supreme Court of the Territory, in this matter in this:

I.

At the time the Lamareaux heirs attempted to take an appeal from the judgment of the Probate Court to the District Court of the Territory, there was no law authorizing such appeal. The District Court for this reason had no jurisdiction to hear and determine the case. The Supreme Court therefore erred in affirming its judgment and holding that such an appeal was then authorized by law.

II.

The District Court erred in finding as a fact that the sale of seven by ten rods in the southwest corner of said lot, made by Samuel P. Hoyt, to Samuel C. Snyder, on the 11th day of

March, 1860, was without the consent of Isabel Lamareaux and the children, whereas the evidence shows, and the findings of fact should have been that said sale was made with such assent. The Supreme Court therefore erred in adopting this finding as a fact.

III.

The District Court erred in holding as *a conclusion of law*, that the said sale of seven by ten rods of said lot, made on the 11th day of March, 1860, was illegal and void, and did not transfer to the said Samuel C. Snyder, nor to said Folsom, the *right* of possession to the same. Whereas, the said District Court should have held that said sale was lawful and did authorize the transfer of the possession thereof to said Snyder, and that from the said 11th day of March, 1860, to the 21st day of November, 1871, the adverse possession of the said William H. Folsom was *lawful* and *rightful*. The Supreme Court erred in not so holding or in affirming the decision of the District Court.

IV.

For the errors assigned in the second and third assignments above stated, the District Court ought to have granted a new trial to the said Folsom, and the Supreme Court of the Territory erred in failing to so decide.

V.

It appears from the whole proceedings in this matter, that by the law and the equity of the case, the said William H. Folsom is entitled to a deed for the seven by ten rods of this lot. The Supreme Court of the Territory therefore erred in awarding the deed of this part of said lot to the Lamareaux heirs.

For these and other good reasons appearing in this case, the said William H. Folsom prays this Court to reverse said judgment, and order the deed of said seven by ten rods of said lot to be given to him.

As to our first assignment of error, (Printed Record, p.p. 3 and 7, top of each,) we find that from 1852 till June 23, 1874, there was, by the laws of Utah, an appeal from the Probate Court to the District Courts in civil cases (Stat. Utah of 1852; 38, Sec. 2, and 43, Sec. 31. C. L., 1876, 492. Title IX, Chap. I, Townsite Act, C. L., 1876, 1381, Sec. 4). This was settled, if it needed to be settled, in the cases of Cannon v. Pratt, in 99, U. S., 620. But the Act of Congress, entitled, "An Act in relation to the Courts and Judicial Officers in the Territory of Utah," approved June 23, 1874, found in C. L. 1876, 51, in 3d section, provides (p. 54,) that from the judgments of the Probate Court, an appeal should lie to the District Court of the district embracing the county in which such Probate Court is held *in such cases and in such manner* as the Supreme Court of said Territory may, by general rules formed for that purpose, *specify and designate*, and such appeal shall vacate the judgment appealed from, and the case shall be tried *de novo* in the appellate court.

The appeal in the case of Cannon v. Pratt, *supra*, was taken before the passage of this act. In the case at bar, the appeal was not attempted to be taken till near three months after its passage, though the judgment of the Probate Court was rendered twelve days before that date.

No rules of the Supreme Court of the Territory, *specifying and designating the cases and the manner* the appeals should be taken, till February, 1875, and July, 1876. This act is inconsistent with the statutes of Utah, relating to appeals in civil cases from the Probate Court to the District Court in this: The Statutes of Utah regulated the cases, the time and the manner of taking such appeals. This act authorizes the Supreme Court of the Territory of

Utah to *designate the cases, the time and the manner of taking them.*

This act, section 7, provides that all laws of said Territory, inconsistent with this act arehereby disapproved. Which, according to section 6 of the Organic Law of the Territory, renders all laws of the Territory on the subject of appeals from the judgments of the Probate Courts to the District Courts in civil cases *null, and of no effect.*

The Constitution of the United States, Article III, Sec. 2, Subd. 2, provides that the Supreme Court shall have appellate jurisdiction both as to law and fact, *with such exceptions, and under such regulations as the Congress shall make.* Until Congress made the exceptions and the regulations, no appeal could be taken to the Supreme Court.

We need no authority on this point, nor do we think we need authority to settle the point that, until the Supreme Court of the Territory made the rules settling the *cases, the time and the manner of taking appeals,* no appeal could be taken from the judgments of the Probate Court to the District Court.*

The second error assigned relates to the findings of fact.

The findings of facts on page 5, printed record, says the sale was made with the knowledge but *without the consent of Isabel Lamareaux and the children,* and that the money arising from the sale was applied to the payment of the Hoyt debt, and *the balance to the said Isabel Lamareaux.*

Whether Mrs. Lamareaux did or did not consent was the question.

Hoyt said (p. 11[illegible] printed record), shortly before the sale of this land he went and talked with Mrs. Lamareaux in relation to the lot. She seemed to feel very bad about it. He asked her what would satisfy her. She told him if she could have a small portion of the lot, where the house was, that was all she wanted.

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*P. S.—The Utah reports contain the rules but does not show when they were adopted. The small point at the close is error, it should be 1876. We send the certificate of the clerk in this matter. See Appendix. Z. S.

He proposed to her to save three rods by ten rods where the house was and wanted to know if that would satisfy her. She said it would. He then relinquished that part of the lot. On his cross-examination he said the widow did not refuse to allow the sale of the property.

Mr. John H. Dewey (printed record p. 21), says: Before that sale he was sent for by Mrs. Lamareaux. He went. was introduced to Mr. Hoyt, who was there. Mr. Hoyt said he had come to have Mrs. Lamareaux consent to the sale of the lot to pay a debt of a hundred and eighty some odd dollars. He did not know the exact amount. Mrs. Lamareaux asked his advice, what he thought she had better do. He told her if she felt like doing so, to do it, if not, not to do it. She said to Mr. Hoyt, my answer to you is I shall not consent to the sale of the property. Mr. Hoyt then said he had a mortgage on it, and the law would allow him to sell it.

She then said: Mr. Hoyt, it is the first time you have claimed to have a mortgage on it, and I do not think you can produce it.

Here the conversation ended, and Mr. Hoyt went out and measured off the seven by ten rods.

Mr. Latimer (printed record p. 22), said the land was sold for $510, and Mr. Snyder paid Mrs. Lamareaux on this purchase, one yoke of oxen, one wagon, one pig, one pig pen and some store goods.

It is to be remembered that Mr. Hoyt and Mr. Latimer were disinterested witnesses, and Mr. Dewey is the husband of Ann L. Dewey, one of the claimants. It is also to be remembered that honesty required debts to be paid; that Mrs. Lamareaux, by the sale made, would have left for her use the house and three by ten rods of the land, and other means to aid herself and minor son, aged fifteen years, the other two children being married, and one aged twenty, the other twenty-five years.

The facts found by the Court shows this payment, and we add, the acceptance of the purchase money from Snyder over and above what was going to Hoyt, by the widow and

heirs, was a confirmation of the sale, even though prior thereto they had objected.

2 Smith's Leading Cases, 5 ed, 662.
2 Dillon on municipal corporations, 459, note and the authorities there cited.
Cooley's Case Lim., 541.

Though these cases were decided under laws for taking private property for public use, yet, so far as payment is concered, the principle is the same.

No objection was made to this sale for a little more than ten years. During all this time Folsom was on the land, claiming and improving it, and Mrs. Lamareaux and the children, *making no* objections thereto. Are we not more than justified in concluding that consent was given, if not expressly, at least impliedly?

We now pass to the error assigned, envolving the merits according to the facts formed by the court.

This is one of a class of cases where neither has the legal title, both are seeking to obtain it. Both rely on the act of Congress as the government which confers and controls the right. Both claim that they are the beneficiaries under the act.

This brought before our courts, and we think from the facts found by the District Court, and adopted by the Supreme Court of the Territory, brings before this court to determine which of the two parties is entitled to the deed under the act of Congress.

Stringfellow v. Cain, 99 U. S., 613.

The act of Congress confers the title upon the local town authorities in trust for the several use and benefit of the *occupants according to their respective interests.*

14 Stat. 541.

The whole trouble in the cases, whether we consider the statutes of the local authorities or the decisions of the local courts or of this court, is in determining the true meaning of the clause. No doubt Congress has the right to define the persons, and the conditions upon whom the legal title shall

be conferred. It has done so. It must be *on the occupants according to their respective interests.* An occupant is one who either actually occupies the lot or actually owns the improvements thereon; and, it may be both, yet the date of entering on the unoccupied lot, and of making the improvements has its bearing on the case. Some date must of necessity, be fixed. The act of Congress has not fixed it.

It says whenever any portion of the public land of the United States *has been or shall be settled upon and occupied as a townsite*, showing that Congress intended to apply the law to cases where public lands were at the date of the act, settled upon and occupied as a townsite, as well as to such public lands as might thereof be so settled upon and occupied. To towns then in existence, of which Salt Lake City is one, it operated as a grant of the right in *presenti*, and to future settlements as a grant of the right in *futuro*.

Before the date of this act, the settlers and occupiers of public lands as a townsite, had only a *hope, an anticipation and expectancy* that Congress would do in the future as it had done for many years in the past, confer the first right of purchase on the *town settlers and improvers*; so that this right of occupancy and improvement of the public land was, and we think justly too, considered by the local authorities and the settler, property which could be acquired by occupancy and improvement, and sold or pledged, or the possession surrendered to another, or lost by abandonment or the failure of the local legislature to to prescribe the rules of settling the rights, or of the local town authorities failing to file the claim under the act.

Such appears to us to be the just conclusions of the settlers, the statutes, the decisions of the local courts and of this court.

Clark v. Shultz, 4 Mo., 235.
Woodworth v. Fulton, 1 Cal., 310.
Grover v. Hawly, 5 Cal., 486.
Norris v. Russell, 5 Cal., 250.
Lechler v. Chapin, 12 Nev., 45.

Shelly v. Spalding, 6 Mich., 198.
Cofield v. McLelland, 16 Wall. 331
Hussey v. Smith, 99 U. S. 20.
Stringfellow v. Cain, 99 U. S. 610. id
Cannon v. Pratt, 99 U. S. 619. id

The legal title is to be conferred on the party to whom it justly belongs, justly in this statement, includes legally and equitably. It is analogous to the universal rule in equity, where the equities are equal, the legal title prevails, and also to the rule that the superior equity prevails over the legal title. And that even where there is no statute of limitations, equity will not aid stale claims.

Story's Equity Pleadings. Secs. 485, 508.

In this case, as shown by the agreed statement and the findings of fact, it appears that at the date of the act, March 2, 1867; the date of the act of Utah prescribing the rules, February 17, 1869; and the date of the entry by the Mayor, November 21, 1871, Folsom was in the actual occupancy and the actual owner of the improvements.

Printed Record, pp. 5 and 8.

The party in possession is deemed the owner.

Bird v. Listras, 9 Cal. 5.
Gregory v. Haynes, 13 Cal. 595.

The legal title, or legal right to the title, whichever name we give it, fell in him by the very terms of the act itself. If we look at it in an equitable view, Folsom has the superior equity. He bought the land and paid for it. Mrs. Lamareaux got a part of the money and made no claim on the land for ten years, she and her children living near by on the same lot. Until the right to a deed vested, which was November 21, 1871, there was not, and from the very nature of this class of property there could not be, any inheritable interest in the land, nor any right of dower.

Bowers v. Keeseker, 14 Iowa, 301.
Brown v. Throckmorton, 11 Ill., 580.
Pierson v. David, 1 Iowa, 23.
Davenport v. Farrar, 1 Scam. 315.
Delauny v. Burnett, 4 Ga., 454.

The right to, or property in, this class of property would, on the death of the ancestor, in the absence of any legislation by Congress on the subject, pass to the personal representatives, and the widow and heirs take as distributees not by inheritance.

Grover v. Hawley, supra.
Gatewood v. McLoughlin, 23 Cal. 178.

Z. SNOW,
E. D. HOGE,
Attorneys and Solicitors for Folsom.

SUPREME COURT OF UTAH TERRITORY.

At the January Term of said Court, A. D. 1875, a series of rules was adopted concerning the practice in said court, to the number of twenty-two in all, of which series rule XXII was as follows, to wit:

RULE XXII.

Any party aggrieved, may appeal from a judgment of a Probate Court to the District Court of the district embracing the county where such Probate Court is held, at any time within six months after the rendition of such judgment, in the same manner, and with like conditions and provisions as are now made by law for appeal from the District Courts to the Supreme Court; the provisions in that behalf of the "Act to regulate proceedings in civil cases in the Courts of Justice of this Territory," etc, approved February 17th, 1870, are hereby adopted and made applicable to such appeals from the Probate Courts, *mutatis mutandis*, except that on such appeals, causes shall be tried *de novo* in the appellate court.

At the June term, A. D. 1876, to wit: July 6th, 1876, of said Supreme Court of Utah Territory, additional rules concerning this practice in said Court, were adopted as follows, to wit:

RULE XXIII.

An appeal may be taken to the District Court of the district embracing the county in which such Probate Court is held, from an order, decree or judgment of said Probate

Court, when the estate or amount in dispute exceeds three hundred dollars, in the following cases, to wit:

1st. For or against granting or revoking letters testamentary, or of administration, or of guardianship.

2d. For or against the validity of a will to probate.

3d. For or against the validity of a will, or revoking the probate thereof.

4th. For or against setting apart property as homestead, or making an allowance for a widow, or child, or children.

5th. For or against directing the sale or conveyance of real estate.

6th. On the settlement of any account of an executor, administrator or guardian.

7th. For or against declaring, allowing or directing the payment of a debt, claim, legacy or distributive share.

XXIV.

Such an appeal may be taken within sixty days after the order, decree or judgment is made and entered, and shall be, by filing with the clerk of the Probate Court, a notice stating the appeal from the order, decree or judgment, or some specific part or parts thereof, and by executing an undertaking or giving surety in the same manner and to the same extent as in cases of appeal to the Supreme Court from a District Court. Provided that in cases of appeal by an executor or administrator, who has given an official bond, no additional undertaking need be given.

XXV.

The trial of such appeal from the Probate Court shall be *de novo* in the District Court, but when the appellant in his notice specified only some specific part or parts of a decree or judgment, appealed from the trial in the District

Court, shall be confined to this part or parts so specified, and the balance of such order, decree or judgment shall stand unaffected by such appeal. Appeals shall be allowed from the orders, decree, and judgments of the District in such appeal cases to the Supreme Court, in the same manner and upon the same terms as provided by law in other cases.

XXVI.

From all orders, decrees or judgments specified in rule 23, entered since the 25th of June, 1874, appeals may be taken in the manner by the foregoing rules provided within sixty days from the publication of these rules.

TERRITORY OF UTAH, } *ss.*
SALT LAKE COUNTY. }

I, EZRA T. SPRAGUE, Clerk of the Supreme Court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true and correct copy of Rules of said Court: Nos. 22 to 26 inclusive, whereof said Rule 22 was adopted January Term, 1875, and all the others at, and not prior to the June Term, 1876, on file or of record in my office.

In Testimony whereof, I have hereunto set my hand and the Seal of said Court, this 9th day of December, A.D., 1880.

[L.S.]

E. T. SPRAGUE,
Clerk.

OFFICE SUPREME COURT U.S.
FILED
JAN 24 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

WILLIAM FOLSOM,
Appellant.
vs.
ANN DEWEY, *et al.*,
Appellants.
} *No.* 253.

SUPPLEMENTAL BRIEF FOR APPELLANT.

This is an appeal from the decision of the Supreme Court of Utah, in a town-site case originating in the Probate Court, to determine the right to the deed from the United States to a part of a lot situate in the city of Salt Lake.

The circumstances of the case and assignments of error are fully set forth in the original brief to which I refer, and upon which appellant relies. This brief being additional to that, and the argument of one of the counsel.

No new principle is involved in the case, but it is determined by the prior adjudications of this Court.

Stringfellow vs. Cain, 9 *Otto*, 610.
Cannon vs. Pratt, 9 *Otto*, 619.
Hussey vs. Smith, 9 *Otto*, 20.

The main facts are settled by stipulation, and the finding of the Court based thereon.

Record, pp. 7, 8, 3, 5, 6.

The Supreme Court of the Territory affirmed the decision, and thereby adopt the findings and conclusions of the District Court.

Record, p. 24.

The findings are a special verdict, and the whole record is now here for review on appeal.

Stringfellow vs. Cain, p. 613.

Before the litigation began, the land was unsurveyed Government land, a part of the city of Salt Lake, and thereby reserved from sale in the usual way. The original claimants were squatters, without any pretense of right against the Government. Their rights to occupancy were protected as against each other by local authority. A. L. Lamareaux first claimed the property in question; he gave a mortgage and power to sell the land in 1851, to secure a small debt.

In 1860, the supposed right of Lamareaux was sold under this power to one S. C. Snyder, who took a peaceable and undisturbed possession of the property and thus acquired the right of occupancy.

Record, fol. 6, *p.* 5.

In 1861, Folsom finding Snyder in possession, bought that possession of him.

From the 9th day of February, 1861, to the time of filing claims in the Probate Court in 1872, Folsom claimed the property as occupant, exercised all rights of ownership, and his title was never called into question by any of the Lamareaux heirs, who lived next door, who saw Folsom making improve-

ments thereon, and acquiesced in the assertion of right by Folsom.

Record, p. 5.

Some testimony is put into the case as to whether the original indebtedness and mortgage from Lamareaux to Hoyt had been paid. In my view of this case, that question is immaterial.

Payment of a mortgage is no defense to title in the hands of an innocent purchaser, acquired by foreclosure.

But a more important consideration is that Lamareaux had no title. He was a mere trespasser upon the public domain; and when he or his heirs ceased to occupy, and some one else obtained a peaceful possession, the right of Lamareaux ceased, and the right of the new occupant was created.

The terms of the trust raised by the statute of the United States are "in trust for the several use and benefit of the occupants thereof, according to their respective interests."

Revised Statutes, Section 2387.

The sole question here is, was Folsom the occupant within the meaning of that statute?

He who had actually occupied the land for eleven years and made "valuable improvements" upon it, without protest or objection from any one, or were they occupants who were the heirs of a man who occupied twelve years before, who had mortgaged and given up all pretense of possession to a claim under that mortgage.

Under the same law, from the same Territory and under nearly the same state of facts, this Court says:

"The infants could not bind themselves by contract to sell

and convey their possessory rights, *but they might lose their rights by a failure to keep possession.* They need not maintain an actual occupancy, but they must, in some form, retain control of the property to the exclusion of an adverse entry. * * * Applying these principles to the facts as stated, we think it clear that the rights which the children had as occupants on their father's death, was given up by their mother, except as to that part of the lot they had in actual possession when the corporate authorities purchased the land from the Government. * * * *It matters not, for the purposes of this inquiry, whether this*" [the failure to keep possession] "*was rightfully or wrongfully done.* In point of fact, it was done many years before the purchase from the Government."

Stringfellow vs. Cain, 9 *Otto*, 617.

In the case cited, the father had died in possession, as in this case, but not having even a mortgage as a shadow upon any part of his lot. The mother in that case, as in this, had continued to occupy a part of the lot; as in this, she had yielded to the demand of another to take possession of a part of the lot; the time of occupancy is about the same.

The only difference is, that in the Stringfellow case the claimant who succeeded began his adverse occupancy without a shadow of right, but an arbitrary demand; in the case at bar, Lamareaux mortgaged it, and Folsom was a *bona fide* purchaser.

In Cannon *vs.* Pratt, this Court awarded the land to Mrs. Pratt, although she and her husband had joined in a deed of the premises, and afterwards was allowed to occupy on a re-entry, by permission from the grantee in the deed; though there by license, she was the "occupant." She received the second deed under the trust created by Congress, in spite of, and in the teeth of, her own deed, by the decision of this Court. The test made by those cases is solely that of "adverse occupancy." In

Hussey *vs.* Smith, the occupancy of the mortgagor was not adverse.

If there had been a statute of limitations in Utah in 1861, there would be no doubt that Folsom's entry in February, 1861, was the beginning of a right by adverse possession. The United States statute, granting these lands to actual occupants, creates a limitation barring all not in actual occupancy. And Congress has the undoubted right to sell or give these lands to whomsoever it pleased, however wrongful their claims.

Frisbie vs. Whitney, 9 *Wal.*, 187.
Yosemite Case, 15 *Wal.*, 77.

The act of the Utah legislature, authorized by act of Congress, directs the Mayor to enter the lands, and the Judge of Probate to adjudicate who is entitled to deed.

Comp. Laws, p. 379.

It is unnecessary to quote its terms here in this supplementary brief.

About the time of the filing before the Probate Court in this case, by which this litigation was commenced, the legislature of that Territory defined who was possessors of lands as follows:

"That any person lawfully and peacefully in possession of real property is deemed rightfully possessed thereof to the lands of his possession, until otherwise determined by due course of law.

* * * * * * * *

"Any person who shall have been in open, peaceable, and undisturbed possession of real property within thirty days preceding such unlawful entry or detainer, is entitled to the benefit of this act."

Comp. Laws, sec. 1196, *p.* 392.

This statute should be considered in connection with the town-site act, determining who are "occupants."

Although no title existed out of the Government to this land, Folsom, in other respects, occupies the position of a *bona fide* purchaser. He had no knowledge or notice of the claim of the Lamareaux heirs, and he paid value.

The finding says: Snyder "sold the same to Folsom and put him in possession."—*Fol.* 6.

No deed was given—no writing was necessary to convey a mere right of possession.

Folsom afterwards obtained a deed from Hoyt.

There was a complete abandonment by Isabel, wife of A. L. Lamareaux, and mother of the heirs; she accepted a part of the purchase money. The finding is—

"At the sale, Snyder became the purchaser for five hundred and ten dollars, which money was paid and applied on the money due on said writing, *and the balance to the said Isabel Lamareaux.*"

Record, fol. 6.

The mother may abandon lands for herself, and for her minor children, also.

Stringfellow vs. Cain.

The plaintiffs are equitably estopped by their conduct from asserting any right to the land as against Folsom.

In Dickerson *vs.* Colgrove, 10 Otto, this Court decided that, the owner of land who, knowing that another was making valuable improvements on the property, did not claim it, but induced the possessor to think he would not claim it, was estopped.

Our case is a stronger one of estoppel than that. Folsom paid his purchase money without knowledge of the claim.

He "made valuable improvements thereon."

Record, fol. 6.

The heirs lived next door, on another part of the lot; they must have known that Folsom was making those improvements in the belief that he was the sole claimant of the possessory right. Not one of them spoke to warn him that the improvements were made at his own risk.

Having the chance to speak and claim their rights, if they had any, they remained silent, although the youngest had been of age five years, and the oldest fifteen. During these long years the situation and value of property has changed; what was of little value in 1861, has become the centre of a thriving city. Folsom's improvements have added to its value.

As those heirs remained silent when they should have spoken, thay cannot now be heard to claim the rights they abandoned.

ARTHUR BROWN,

W. N. DUSENBERRY,

Of Counsel for Appellant.

FILED
MAR 5 1900
JAMES H. MCKENNEY, Clerk

IN THE

Supreme Court of the United States

No. 252.

WILLIAM H. FOLSOM, APPELLANT,

vs.

ANNA L. DEWEY ET AL., APPELLEES.

On Appeal from the Supreme Court of Utah Territory.

BRIEF ON BEHALF OF APPELLEES.

BY

Thomas Murphy & Co., Law Printing Establishment, Washington, D. C.

In the Supreme Court of the United States.

No. 253.

WILLIAM H. FOLSOM, APPELLANT,

vs.

ANNA L. DEWEY ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR APPELLEES.

All appeals noted in this record have been abandoned, save the appeal prayed by Folsom and allowed; (Record, p. 24;) and no alleged errors are brought here by any pending appeal, save those assigned by Folsom. (Record, p. 7.)

I. The appellant's first assignment of errors (Brief, p. 12) makes the point that a judgment rendered by the Probate Court on the 11th June, 1874, (Record, p. 2,) and on which no appeal had been taken prior to the taking effect of the act of 23d June, 1874, (18 Stats., 253, 254,) could not be appealed, under the provisions of said act, until after "general rules" were framed by the Supreme Court of Utah, as prescribed in the third section of such act. That, hence, the Lamareaux heirs could not appeal, as they did, on the 29th of August, 1874, (Record, p. 2,) because

on that day no rules had been so prescribed by the Supreme Court.

To this we reply:

It is not denied, but is admitted, in the opposing brief, (Record, p. 14,) that such a judgment by the Probate Court could be appealed, as this was, up to the 23d of June, 1874, and that such is the decision of this court in

Cannon *v.* Pratt, 9 Otto, 620.

But it is claimed that said act took away all right to appeal cases not appealed at the date of the act, until said rules should be prescribed, and then only under such rules.

And the question thus made is whether judgments rendered *before* the date of the act, in which the time for appeal had *not* then "expired," and which had not been then (23d June, 1874) "executed," could be appealed under the laws existing up to the date of the act?

The answer to this is furnished by the following considerations, interpretative of the said third section:

(A) There are no retrospective words in this act tending to make the act apply to such judgments as this, and which were rendered *before* the act was passed, and which were unexecuted, and by law still appealable at the date of the act. And when such is the character of the statute, it will never be construed to retroact on past judgments so as to cut off, as to them, existing rights of appeal.

Says Cooley's Constitutional Limitations, 461:

"It is a sound rule of construction that a statute should have a prospective operation *only*, unless its terms show *clearly* a legislative intent that it should operate retrospectively." And see cases cited note 2.

(B) Although at the date of the approval of the act of the 23d June no appeal had been in fact taken, yet, as the time for appeal had not expired, therefore this was then a suit "*pending*." See this expressly held in Backes *v.* Dant,

55 Ind., 181; and hence, to make the said act of 23d June take effect on this case, is to make it strictly retroactive and to cut off rights in suits "pending." This will never be done unless the repealing statute clearly requires it.

(C) Again, even did the act of 23d June repeal (as it does not) the prior laws regulating appeals, yet, since it "*substantially*" re-enacts the law giving appeals, therefore, as to pending cases, the *old law*, regulating appeals, *continued in force* for the purposes of all such pending cases.

Says the Maryland Court of Appeals (45 Md., 624):

"There is high authority for the position that where a repealing law contains a *substantial* re-enactment of the previous law, the operation of the latter continues uninterrupted. 3 Wis., 667; 9 Ind., 337; 1 O. S., 603."

(D) The act, in expressly providing for a certain class of judgments theretofore rendered, to wit, those as to which the time for appeal had expired, and enacting that *such* class were validated, thereby, in effect, provides that all *other* judgments then rendered, where the time to appeal had *not* expired, might be appealed under existing laws, under the principle held in the cases above cited, continuing in force the old law, as to pending cases, where the new law "substantially" re-enacts the old.

(E) It cannot be claimed that the provisions in section 7 of act of 23d June, 1874, (18 Stats., 256,) which "disapproves" territorial laws inconsistent with said act, or any other provision of said act of 23d June, has the effect of a present and absolute repeal of the then existing laws, (named at page 620, 9 Otto,) giving and regulating the right of appeal from such Probate Court decisions, because, among other reasons, this would be to hold that such appealed cases then (23d June, 1874) pending in the District and Supreme Court, such as *Cannon* v. *Pratt*, would fall by the repeal of the act giving the appeal.

Ex-parte McCardle, 7 Wall., 506–514.

The fact that this court, in Cannon and Pratt—wherein the probate judgment was on 28th November, 1873—date of appeal 3d February, 1874—date of District Court judgment 26th November, 1875; and in *Hussey* v. *Smith*, wherein the decision of the Probate Court was, on the 28th November, 1873, the appeal on the 3d February, 1874, the District Court judgment 26th November, 1875, and judgment of Supreme Court of Territory 18th February, 1876; and in *Stringfellow* v. *Cain*, wherein the probate judgment was 12th April, 1873, the appeal was in April and May, 1873, and District Court judgment was 11th September, 1874—held that the appellate jurisdiction of the District Court and the Supreme Court of the Territory *continued* after the approval of the act 23d June, 1874, and did not fall with the enactmant of that law, is a decision that the act of 23d June did not repeal or supersede the acts giving said appeals. Hence these cases in 9th Otto are, in effect, decisions that judgments already rendered when that law was passed, and where the time to appeal when the law passed had not expired, might be appealed under laws *existing when the judgment was rendered*. In other words, that as to past judgments appealable, such laws continued in force as well for perfecting the appeal as for trying it.

(F) When a repealing act names neither pending nor future actions as coming within the effect of the new law, there, as a principle of legal interpretation, such act will be held not to affect pending cases. So it is expressly held by the highest authorities; as, for example, in *Fisher* v. *Cockerill*, 5 T. B. Monr., 102, where an act of 1824 broadly and without reservation "repealed" an act of 1820 under which a judgment in favor of an occupying claimant was rendered before the repeal; and the case was sent to a commissioner for an account. Before the judgment on the commissioner's report was rendered the re-

peal occurred, and in a most able and exhaustive opinion the court held that "because the act of 1824 names neither pending nor future cases, it shall be taken by the courts that the future *only* were intended."

The act of 23d June names neither past nor future cases, except in the way noted in paragraph "D" above. That mention of judgments theretofore rendered, as to which "the time for appeal had expired," and which had been "executed," as the ones which should remain as they then were, has the effect, under the maxim *expressio unius est exclusio alterius*, to aid the construction that all *other* past judgments than those "executed," and as to which the time to appeal had expired, should *not* remain as they were, but might be appealed.

II. The second assignment of errors (Brief, 12 and 13) is that the Supreme Court erred in finding the fact to be that the southwest corner of the lot sold by Hoyt to Snyder was so sold without the consent of the widow and heirs of the original occupant, A. L. Lamareaux.

This assignment, as inviting this court to retry the *facts* found by the Supreme Court of the Territory, (9 Otto, pp. 613, 614,) in its affirmance of the decision of the District Court, (Record, pp. 23, 24,) is one this court cannot notice, because this court must accept the facts as found below.

Act of 7th April, 1874, 18 Stats., pp. 27, 28.
Stringfellow *v.* Cain, 9 Otto, pp. 613, 614.

III. The third assignment of errors is one asserting that the sale of 11th March, 1860, (Record, p. 5,) by Hoyt to Synder was legal, and that the court erred in holding it illegal, and that it gave no right of possession to Snyder or to his vendee, Folsom; whereas the court ought to have held that said sale authorized the possession from its date, 11th March, 1860, to the date of the entry by the mayor of Salt Lake City, 21st November, 1871, (Record, p. 3,) of the

7x10 southwest corner by Snyder and by his vendee, Folsom.

This assignment is not one asserting that in law there was a "voluntary" abandonment of this corner by the Lamareaux heirs, and a lawful possession thereafter by Snyder and Folsom. On the contrary, it is simply a demand that the court should find that said *sale* "authorized," as a matter of law, said possession, and made it lawful and not wrongful. It raises no question as to the legal effect of voluntary abandonment and succeeding peaceable possession.

Such being the assignment of error, there was no error, for the manifest reason that said sale had no element of legality.

We do not know that counsel on the other side now seriously claim that there was error in that part of the court's finding, (Record, p. 5,) which holds the sale by Hoyt, made 11th March, 1860, on the authority of the paper Exhibit 4, (Record, p. 20,) "illegal and void," and one not transferring the right of possession to S. C. Snyder of said southwest corner.

The sale was one made without any judicial sanction. It was made without any administration ever having been had upon the estate of the party who executed said Exhibit 4, such party having been then five years dead. (Record, pp. 3, 4.)

It was made as against heirs, some of whom were then infants or under coverture, or both. (Record, p. 3.)

It was made to satisfy an alleged claim never reduced to judgment, and which was claimed to be part fraudulent and residue paid. It was made under a pretended power, never acknowledged as the law required deeds to be for estates in lands.

It was made after the donor of the alleged power was long dead.

It was the sale of a homestead protected by law from such sale.

The finding is that possession was taken "by *virtue of said purchase*," and not by virtue of any "voluntary" relinquishment by Lamareaux's heirs. (Record, p. 5.)

The pretended power in Exhibit 4 (Record, p. 20) to make the deed was in "Brother" Thomas Bullock and not in "Brother" Hoyt, and yet not only did not Bullock ever make the "transfer," but neither did Hoyt do it, but Smith did it on mere verbal authority from Hoyt, who had no power to authorize or make the "transfer." Even Bullock had no power to make the "transfer" until after he had found as a condition precedent thereto that such sale had been "made to the best possible advantage," (Record, p. 20;) and yet Bullock never exercised any part of this power, much less did he find this condition had been performed.

In executing a power "there must be a strict adherence not only to the substance of the power, but also to all the formalities required in its execution by the instrument."

2 Perry on Trusts, sec. 511 b, and cases.

We think it not becoming in us to discuss, in this court, the proposition that the resort, by Hoyt, to the device of such a sale, as a means of forcing this widow and children out of their homestead, is not only void, but is a gross and oppressive fraud, meant to impress the ignorant as being the irresistible demands of law, when, in fact, it was without color of legal right.

Hence the third assignment of errors is not well taken, because the sale by Hoyt, being wholly void, could confer no right of possession; and no *other* sale or assent is, directly or indirectly, alluded to in the assignments as a predicate for the demanded finding in law of a rightful possession.

IV. The fourth assignment (Brief, p. 3) is that the court erred in refusing a new trial on the grounds stated in assignments 2 and 3.

These two assignments being bad, of course the fourth, based on them, is bad.

V. The fifth assignment is the general one that "by the whole proceeding, it appears that, by the law and equity of the case, Folsom was entitled to the deed" for the northwest corner.

It will be seen that Folsom, in the Supreme Court filed no petition or new assignment of errors; and in the District Court he assigned none *different* from those assigned in this court. In no stage of the case was any court ever invited, by specific assignment of errors or otherwise, to pass upon the question whether a mere failure by the Lamareaux heirs, to retain actual control or possession of this corner, together with the possession from 1860 to 1871, by Folsom, *without any lawful sale*, gave right to the deed.

This point is made for the first time in the argument, and is *omitted* in the assignment of errors in the brief filed here.

In view of this we submit that this point, so never assigned anywhere as error, and not brought specifically, by assignment, to the attention of any court below, so as to give opportunity to *there* pass upon it, is *waived*, and cannot be relied on here as error, even were it (as it is not) assigned for error here.

Bell *v.* Bruen, 1 How., bottom of p. 187.
Marine Bank *v.* Fulton Bank, 2 Wall., 252.
Lucas *v.* Brooks, 18 Wall., 436–456.
Portland Co. *v.* U. S., 15 Wall., 1.
Wheeler *v.* Sedgewick, 4 Otto, 1.
Benton *v.* Driggs, 20 Wall., 125.
Coddington *v.* Richardson, 10 Wall., 516.
Ryan *v.* Koch, 17 Wall., 19.

VI. The failure to make below the point that there was a "voluntary" abandonment of the property in suit, and a resulting vacancy thereof, and rightful possession

thereafter by Folsom, which gives Folsom the right to the deed, and seeking to make *that* claim, for the first time, in the argument here, is a wrong not in form merely, but is one of the gravest substance. It is this not only because these heirs had a right to the trial, discussion, and decision of *this* point in the courts of first instance, and not to be required to meet the question in this court for the first time, as if this were one of original jurisdiction, but also because they had, as part of this right, the right to *prepare their evidence* below to meet it below. Had the point been made in the Probate or District Court, it is plain, from this record, that fuller proof could have been made on the point that Mrs. Lamareaux and her children did not "voluntarily withdraw," and silently submit to the oppressive dispossession. And, moreover, the court below, had attention been drawn to this very point, could, and doubtless would, have found more explicitly upon the point of "voluntary withdrawal" and silent acquiescence, as the basis of Fulton's claim, instead of making the *legality of said sale* of March 11 such basis.

Therefore the rule that forbids new and substantive grounds of error to be here raised for the first time is not one of mere convenience, and therefore directory merely, but is one jurisdictional and of substance, which the court will not disregard.

U. S. *v.* Larkin, 18 How., 557–561.
Hudgins *v.* Kemp, 20 How., 53.
Commander-in-Chief, 1 Wall., 43; 16 Pet., 195.
R. R. Co. *v.* Lindsey, 4 Wall., 650.
Fretz *v.* Stover, 22 Wall., 198, and cases cited.
Hoe *v.* Wilson, 9 Wall., 504.
Kittridge *v.* Rice, 2 Otto, 116–119.

In speaking of an attempt in this court to set up, for the first time, the claim that a certain grant was fraudulent, this court says, in U. S. *v.* Larkin, 18 How., 561:

"To permit it to be taken in the appellate court for the first time, where there is no opportunity for explanation, would be a surprise upon them of which they might justly complain."

We therefore respectfully submit that it is too late to assign as error here, for the first time, that the court should have found the fact and law to be that Folsom's rights grew out of a "voluntary withdrawal," by the Lamareaux heirs, and a consequent lawful possession of vacant property by Folsom, when the whole claim below was totally different, and was that they were sold out lawfully, and that the *sale authorized* the entry, whether the Lamareaux heirs assented or not.

VII. But suppose we are mistaken in this, and that the fact that Folsom's possession of this southwest corner was below claimed to be lawful and to give the better right, was *broad enough* to include and make the point that there was a voluntary withdrawal by the Lamareaux heirs and a possession by Folsom, made lawful owing to the voluntary withdrawal, then was there error in the court's holding that, under the facts found, Folsom's possession was trespass, and gave no rights as against said heirs?

Appellant claims that Stringfellow *v.* Cain (9 Otto, 617) is a decision holding that a dispossession of the real original and *bona-fide* settler and owner of the inchoate town-site claim, *by a mere trespasser*, gives the trespasser the better right under this law, and that an *involuntary* withdrawal, made in consequence of the trespass, is an abandonment which forfeits the claim of the original settler, although such settler remained on all of the lot which the trespass did not wrest from such settler.

We submit that Stringfellow *v.* Cain does not go to this extent, but holds the opposite; because the court is *careful* to say that what makes an abandonment which authorizes another to take possession, is this: "If she VOLUNTARILY

withdrew and GAVE it up to others." (9 Otto, 617.) And such was the fact in that case. There, there was no resort to fraudulent and oppressive devices, under the guise of a mortgage sale, by which Mrs. Cain was thrust out. The court expressly finds that, however wrongful may have been the influence used by the Mormon leader to induce Mrs. Cain to "*voluntarily* withdraw and *give up*" her property, yet she did it *voluntarily*. Here there is no hint that, had a fraudulent device been resorted to by which the widow was forced out, then she would have forfeited her claim. Had the court so said, it would have been *obiter*, because the case was one of *voluntary* surrender.

In the case at bar the court below expressly find Mrs. Lamareaux and the heirs did *not* "voluntarily" "give up" the property. What is found amounts to finding a forcible dispossession through the means of a dishonest and unlawful device; the heirs all the while retaining all of the *same* lot which the trespass suffered them to retain, and never assenting to *any* dispossession.

We submit that the law on this point is accurately stated by Field, C. J., in Reeks *et al. v.* Reed, 19 Cal., 551, where the chief justice says: "It is true the entry of town lands by the corporate authorities or county judge is, under act of Congress, 'in trust for the several use and benefit of the occupants thereof according to their respective interests'; but this provision does not establish that it was the intention of Congress to give the benefits of the entry to mere temporary occupants of particular tracts at the date of the entry, without reference to the character of their occupancy, and thereby in many instances deprive the original *bona-fide* settlers of the premises and improvements in favor of those who had by *force or otherwise intruded upon their settlement.* Were such the effect of the provision in question, the *trespasser of yesterday or the tenant of to-day* would often be in a better position than parties who, by their previous occupation and industry, had built up the town and made

the property valuable. * * * It [Congress] intended that the original *bona fide* occupants should be the recipients of the benefits of the entry, to the extent at least of their interests, that is, of their actual occupancy and improvements."

That a possession of such public lands, gotten originally by a trespass or fraud, or other unlawful eviction of a *bona-fide* possessor, rightfully holding under the public laws, the trespasser knowing all the while that he holds against the protest and superior rights of the evicted party, cannot ripen into a right to demand the patent from the United States (or its trustee, the mayor), is not only obvious justice, but settled law. And no estoppel, owing to improvements made by the trespasser, or owing to the silence of the evicted party, is ever wrought by such trespass.

Says this court in Hosmer *v.* Wall, 7 Otto, 579, 580:

"In neither case could the right of pre-emption *extend to land in the occupation of the defendant at these dates.* To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor—conditions which *cannot* be met when the land *is in the occupation of another.*" * * * "Under the pre-emption laws, as held in Atherton *v.* Fowler, 96 U. S., 513, the right to make a settlement is to be exercised on *unsettled* land; the right to make improvements is to be exercised on *unimproved* land, and the right to erect a dwelling-house is to be exercised on *vacant* land. None of these things can be done on land when it is *occupied and used by others.*"

And we submit all this is equally true of rights acquirable under the town-site law, for the irresistible reasons stated by (now) Justice Field in Reeks *v.* Reid, *supra.*

Possession "voluntarily given up" is possession ended, and the property so given up is *vacant* and open to others' possession; and this is *all* that was decided touching the present point in Stringfellow and Cain, and all that *could* be legitimately decided, because no other than a case of "voluntary" surrender was in court.

That is not *this* case; but, on the contrary, the facts found show expressly that the dispossession was "involuntary" and the effect of an oppressive resort to fraudulent and simulated proceedings done under pretense of legality.

To say that such fraudulent expulsion of the widow and heirs—they protesting against the expulsion and never assenting thereto—ripens into an estoppel *in pais*, is like saying that the possession and improvements of the brigand or the pirate or mob are the sources of titles so sacred and favored, by the law, that all mouths shall be closed against assailing them, by a conclusive presumption which the law names "estoppel."

Snyder and his grantee, Folsom, had, during every moment of their wrongful possession, notice that the validity of their pretended sale was denied by the Lamareaux heirs; that their right to possession was denied by these; that the title was in the United States, and would be demanded by these heirs; that these heirs are in possession of all the west half of the lot which the trespass of Snyder had not usurped; and this notice of claim, so originally given and never withdrawn, was as much a *continuing* notice of their claim as if repeated each day. All this is completely covered by the principles laid down by this court, and there enforced by citation of abundant authority, in the case of

Brant *v.* Virginia Coal and Iron Co., 3 Otto, 326.

Substantially the same is in

Ketchum *v.* Duncan, 6 Otto, 666.
Ins. Co. *v.* Mowrey, 6 Otto, 547.

The head-note to the above case of Brant, 3 Otto, 326, accurately states what this court there held regarding the present point. It is as follows:

"When the estoppel relates to the title to real property, it is essential, to the application of the doctrine, that the party, claiming to have been influenced by the conduct or declarations of another, was himself *not only destitute of*

knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel."

The doctrine of the cases here cited by this court not only put an end to every shadow of just claim that there is here any equitable estoppel as against these heirs, even had they accepted (as *they* did not) some pittance out of the purchase-money, paid for said southwest corner, under the fraudulently induced opinion that the sale of 11th of March, 1860, could not be by them resisted; but these doctrines make the protest and notice given by Mrs. Lamareaux, at the time of that sale, that she denied the right to make the sale and did not assent thereto, a continuing notice, extending to the present time, and make the possession by Snyder and Folsom to be that of said heirs, and Folsom their trustee as to such possession.

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